

Doing Business in **Massachusetts**

A GUIDE TO U.S. AND MASSACHUSETTS LAWS FOR NON-U.S. BUSINESSES



**FOLEY
HOAG** LLP
ATTORNEYS AT LAW



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INTRODUCTION

This guide is intended to provide foreign businessmen and women with an introduction to the basic kinds of laws and regulations that affect the conduct of business in the United States of America, and particularly in the Commonwealth of Massachusetts. The level of detail is varied, reflecting the nature of the legal areas discussed. For example, environmental law and taxation are subjects of detail and technical regulation, while labor relations are governed as much by custom and practice as by direct regulation.

The discussion under each heading is intended to provide only general guidance, and is not an exhaustive description of all provisions of federal, state and local law with which a non-U.S. business operating in Massachusetts might be required to comply. The laws whose effect is described in this guide are subject to interpretation by courts, may be affected or preempted by federal statutes or regulations, and may themselves be amended or repealed. Particular businesses or industries may also be subject to legal requirements not referred to in this guide.

For this reason, you should not rely solely upon this guide in planning the details of a specific transaction or undertaking. Instead, the pertinent details of any transaction or business project involving Massachusetts should be reviewed thoroughly by qualified Massachusetts counsel.

The Federal System (Levels of Government)

The laws and regulations affecting the conduct of business in Massachusetts discussed below flow from sources at three basic levels: federal, state and municipal.

Federal Law

Federal law derives from the United States Constitution and from statutes enacted by the United States Congress and approved by the President. Federal law usually applies everywhere in the United States, and prevails over conflicting

state or municipal law (but federal and state laws governing the same subject often co-exist without conflict, and in those cases both laws may apply). Most federal statutes are enforced by one or more administrative agencies, which often have authority to adopt regulations interpreting and even expanding on the underlying statutes. For example, the federal laws governing public offerings of securities and tender offers for control of publicly-held companies are administered by the Securities and Exchange Commission. In some areas, such as defining what are fraudulent and deceptive practices in the sale of securities, the statutes leave the definitions entirely to the regulations of that Commission. Other important federal agencies are referred to in the text of this guide.

Massachusetts Law

Massachusetts law derives from the Massachusetts Constitution and from statutes enacted by the Massachusetts legislature (formally named The Great and General Court) and approved by the Governor. It applies only in Massachusetts and prevails over conflicting municipal regulation. Massachusetts law is also administered by a variety of administrative agencies, many of which have authority to adopt regulations. Massachusetts law and regulation is important in, among others, the areas of real estate law, corporate organization, public health and safety, environmental and labor law, and consumer protection.

Municipal Law

Municipal law derives ultimately from Massachusetts state statutes conferring specific powers on cities and towns, and is usually expressed in by-laws, ordinances, or regulations adopted by any of a variety of municipal bodies. It is most significant in the areas of land-use planning, and public health and safety enforcement.

At each of the three levels, the government imposes some form of taxes to support its operations. The principal sources of federal revenues are personal and corporate

income taxes, a variety of excise taxes and customs duties. The principal sources of Massachusetts revenues are personal and corporate income taxes, and a smaller variety of excises. The principal sources of municipal revenues are real estate taxes, an excise on motor vehicles and financial aid from the state government.

Lawyers in the United States

American lawyers are licensed, or “admitted to practice,” by the individual states and by the federal courts in separate federal judicial districts. In most states, there is no formal distinction between branches of the profession – as there is, for example, between barristers and solicitors in the United Kingdom. Many individual lawyers and some firms choose to specialize or concentrate their practices

in particular areas of the law; but most firms of any size (for example, more than 15 members) in the principal urban centers stand ready to provide legal advice and, if necessary, representation in legal proceedings in most or all of the areas of concern to businesses entering the United States.

Similarly, the various terms that lawyers use to describe themselves – such as “attorney,” “counsel,” “counselor,” and simply “lawyer” – do not reflect any formal differences in status or specialty.

FORMS OF DOING BUSINESS IN THE UNITED STATES

An important initial choice facing a foreign person wishing to do business in the United States is the form of business entity from which to conduct U.S. operations. The choice of entity must be carefully considered in light of the specific concerns of a particular business venture. The results in terms of tax treatment, exposure to contract and tort liability, and efficiency and methods of governance will vary significantly in many circumstances depending upon the form of entity chosen. There is no single best choice of entity in the abstract; the different entities all have their unique advantages and disadvantages.

The creation, management and powers of the different forms of business entity are governed by state rather than federal law. Additionally, the offer and sale of securities of the different entities implicate both state and federal securities laws. This section briefly summarizes the characteristics of the different entities. Corporations and joint ventures are discussed in more detail in two separate sections that follow.

Remember that the appropriate choice of form varies with the plans and goals of any specific business venture. The entity is appropriately chosen only after the venture is formulated, and should be tailored to fit the venture. The venture generally should not be tailored radically to fit the entity. The use of hybrid entities, which combine the characteristics of two or more of the business forms described below allows businesses even further flexibility in choosing entities closely matched to their individual needs.

Sole Proprietorship

A sole proprietorship is simply a person engaging in business for himself or herself. No statute governs the organization of a sole proprietorship. However, any person engaged in business under a name other than his own generally must file a fictitious name certificate with the office of the clerk in every town in Massachusetts in which the business has an office.

The principal advantages of this form of doing business are administrative simplicity and autonomy. The owner of a sole proprietorship is his or her own boss. No one else has the

right to participate in management, except the owner may by contract delegate authority or surrender control. A sole proprietorship is not subject to the many record keeping and reporting requirements facing public corporations.

The principal disadvantage of this form of doing business is potentially limitless liability. In the absence of any contract to the contrary, a sole proprietor is personally liable for all obligations of the business to the full extent of his or her personal as well as business assets. In addition, a sole proprietor is liable not merely for torts personally committed, but also for those committed by any employees of the business.

Because a sole proprietorship ends on the death of the proprietor, this form of business organization has no continuity of existence. The interest of a sole proprietor in the business is freely transferable, subject to laws, which, in general, prevent the interest of business creditors from being defeated by the sale of the business.

General Partnership

A general partnership is a combination of two or more individuals by written or oral agreement for the purpose of engaging in ongoing business activities. Partnerships are governed to a limited extent by state statutory law but, for the most part, the relationships among the partners are governed by the terms of the partnership agreement. Tax consequences of the general partnerships' activities are passed through to the individual partners, with no taxation of the partnership entity itself.

The primary advantage of general partnerships is that they permit great flexibility in the allocation of rights, responsibilities, and economic benefits and burdens among the participants. General partnerships allow a number of participants to pool resources while maintaining a great deal of flexibility in deciding how to run their business, and how to distribute gains and losses for tax purposes.

There are a number of disadvantages to the general partnership form. First, a partner in a general partnership is jointly and severally liable for all partnership obligations to

the full extent of each partner's business and personal assets. Second, the flexibility provided by the formation of a general partnership can result in difficult negotiations and complex partnership agreements. Such complex agreements along with an elaborate taxing scheme cause the administrative costs associated with a general partnership to be higher than those of a sole proprietorship. Additionally, the withdrawal of a partner can be cumbersome, and any such withdrawal results in the legal dissolution of the partnership. As a general rule, partnerships become increasingly unwieldy as the number of participants increases.

Joint Venture

A joint venture is essentially a form of general partnership, which is limited to a single business venture. The advantages, disadvantages and tax treatment of joint ventures are the same as those of general partnerships. (Joint ventures are discussed in more detail on page 8.)

Limited Partnership

A limited partnership is a partnership created by written or oral agreement, which provides for at least one general partner who is responsible for managing the partnership and at least one limited partner who is usually a passive investor. Limited partnerships organized in Massachusetts must file a Certificate of Limited Partnership with the Massachusetts Secretary of State.

The principal advantage of a limited partnership is that it combines, to some extent, the flexibility of a general partnership with the limited liability of a corporation. Tax consequences are passed through to the individual partners according to the partnership agreement with no taxation at the entity level. The general partners have great flexibility in managing the enterprise within the confines of the partnership agreement and state law. Limited partners are not responsible for partnership debts and liabilities beyond the amount of their investments. Additionally, since limited partners are simply passive investors, an increase in the number of limited partners does not make the partnership unwieldy to the same extent as an increase in the number of partners in a general partnership.

A principal disadvantage of a limited partnership in many circumstances is that limited partners are greatly restricted in the involvement they may have in the day-to-day management of the business enterprise. To protect themselves, limited partners often insist that the partnership agreement restrict the ability of a general partner to dispose of major assets quickly. Therefore, important decision-making in limited partnerships can be slow. Further, limited partnership interests generally are securities, and therefore the offer and sale of those interests are subject to the requirements of state and federal securities laws.

Unlike a general partnership, the death, withdrawal or expulsion of a general partner does not result automatically in the statutory dissolution of a limited partnership.

Corporation

Each state has its own corporate statute, but the laws are quite similar from state to state. A U.S. corporation doing business in Massachusetts, or any other state, may be organized under the Business Corporation Law of The Commonwealth of Massachusetts, or under the analogous law of another jurisdiction. (See "Forming the Corporation" on page 5.) A corporation may be either public or private. A public corporation is one in which the shares are offered and sold to the public at large. A private corporation has relatively few shareholders, and the shares of a private corporation may not be transferred as freely.

A principal advantage of doing business in corporate form is that the shareholders of a corporation are insulated in most instances from personal liability on the obligations of the corporation. Additionally, the corporation has a perpetual existence; it does not dissolve even upon the death or withdrawal of a sole stockholder. Ownership shares of a corporation are transferred relatively easily, particularly in the case of a public corporation. Also, the statutory law and the case law governing corporations are well-developed, and hence relatively predictable.

The principal disadvantage of doing business in corporate form is that the formal record keeping and reporting requirements imposed by state corporate statutes make

corporations more expensive to administer than some other forms of business entity. Administrative costs are particularly higher for public corporations, which must comply with the complex and rigorous federal securities regulation scheme under the Securities Act of 1933 and the Securities Exchange Act of 1934. Also, most corporations in the U.S. are subject to a “double taxation” system under which income of the corporation is taxed at the corporate level, and distributions of earnings to shareholders then trigger a second income tax at the shareholder level.

Private corporations are the most common form of business entity in the U.S. The public corporate form is generally the appropriate choice for businesses, which require access to the vast U.S. capital market. Public and private corporations are created and governed under the same state corporate laws, and are subject to identical tax treatment. The distinction between the two types of corporations relates essentially to the application of state and federal securities laws.

Limited Liability Company (LLC)

A limited liability company (LLC) is an unincorporated entity organized under state law that combines certain advantages of both a partnership (a single level of taxation) and a corporation (limited liability to members). The Massachusetts LLC statute, which is among the most flexible in the U.S., went into effect on January 1, 1996. LLCs avoid many of the disadvantages and requirements of so-called S-Corporations, which are another type of entity that combines limited liability and flow-through tax treatment, but which prohibit foreign ownership.

The key features of an LLC are:

1. *Flow-through Tax Treatment* – The LLC is not subject to an entity-level tax, provided that the LLC meets the criteria for classification as a partnership for federal income tax purposes.
2. *Limited Liability* – Investors receive protection from the obligations of an LLC similar to that enjoyed by corporate shareholders.
3. *Flexible Management* – Investors may participate actively in the management of the LLC. Alternatively, management of the LLC may be delegated to a manager or group of managers who may or may not be investors.
4. *Flexible Capital Structure* – An LLC may issue multiple classes of ownership interests, may have an unlimited number of owners, and is not constrained as to the types of owners who may hold interests.

These features make LLCs well-suited both for entrepreneurial and privately held businesses and for passive investments, including businesses that develop and sell or license technology, venture capital management, real estate investments, and corporate joint ventures, where the limited liability of all owners is important, and where the freedom of planning distributions and allocations of LLC income and losses is desirable. Existing businesses may be able to take advantage of the LLC statute even if they are not interested in forming a new venture.

One disadvantage of LLCs is that because this form of entity is relatively new, there is not a well developed body of statutory and case law dealing with LLCs, as there is, for example, with respect to corporations. As a result, legal developments in this area may be somewhat less predictable.

Massachusetts Business Trust

A business trust (often referred to as a “Massachusetts business trust” because its use first became common in Massachusetts) is a hybrid entity that combines the characteristics of a corporation, a partnership and a trust. A business trust is a form of unincorporated business organization in which property is held and managed by trustees for the benefit of the beneficial owners of the enterprise. The trustees are appointed under a declaration of trust or other trust instrument, which also describes the trust property, and establishes procedures for the management of the trust and its business. The owners, who receive transferable certificates of beneficial interest in the trust property, may be referred to as the

“shareholders” of the business trust. A business trust that is created under Massachusetts law is required to file its declaration of trust with the Massachusetts Secretary of State and with the city or town clerk of every municipality in which the trust maintains a usual place of business.

The business trust has certain advantages normally found in the corporate form. First, it has perpetual existence. Unlike a general partnership, a business trust does not terminate as investors die or withdraw. A second advantage of a business trust is a limit on the potential liability faced by participants. The shareholders of the trust are liable for trust obligations only to the amount of their investments in the trust. The trustees themselves face potentially unlimited liability, but that liability may be limited by contract. Finally, as in the case of limited partnership interests, except as restricted by the agreement establishing the entity, shares in a business trust are freely transferable.

One disadvantage of a business trust is that only the trustees may participate in the active management of the enterprise (the shareholders are in a position similar to that of limited partners in a partnership). Another disadvantage is that statutory law governing business trusts is less developed than that governing corporations or partnerships. Therefore, one has less guidance in determining how a court might answer a question relating to business trusts. Also, as in the case of limited partnership interests, inter-

ests in business trusts are generally deemed to be securities for the purposes of state and federal securities laws. Tax treatment of a business trust is a hybrid; for federal tax purposes, the business trust is taxable as a corporation, while for most Massachusetts tax purposes, it is taxable as if it were an individual. Use of the business trust form by non-U.S. concerns is somewhat uncommon, but may be appropriate in special circumstances.

Branch of a Foreign Entity

Finally, one can do business in the U.S. as a branch of a foreign business entity. In Massachusetts, as in most jurisdictions, a simple filing with the Commonwealth of Massachusetts Office of the Secretary of State is required of a foreign entity wishing to transact business within the state.

The principal advantage of transacting business as a U.S. branch of an existing foreign entity is that organizational expenses are kept to a minimum since no new entity need be created. The disadvantage, however, is that doing business in such a form exposes the entity's non-U.S. assets to claims arising out of activities of the U.S. branch as well as the possible application of a branch profits tax. (See “Methods of Business Operation and Repatriation of Earnings” on page 47.)

C O R P O R A T I O N S

Most U.S. businesses are organized as corporations, limited-liability joint-stock companies with powers to act as legal “persons” separate from their shareholders. Some, particularly professional service organizations and private investment funds, may be organized as partnerships, or more recently, as registered limited liability companies or registered limited liability partnerships. Some other businesses may be organized as so-called “Massachusetts business trusts,” with powers similar to corporations, but a legal structure founded on fiduciary law. All of those forms and others are available to businesses operating in Massachusetts. (See preceding chapter of this guide.) This section is a brief summary of the legal formation and operation of a corporation.

Forming the Corporation

The form of entity most commonly chosen by non-U.S. businesses is the corporation, since, among other things, the corporate form provides protection for its owners against liabilities incurred in the business, a corporation can be organized quickly and relatively inexpensively, and a well-established body of statutes and case law permits the rights and responsibilities of the corporation, its owners and management, and persons with whom it deals to be ascertained with relative clarity and certainty. A corporation is also a convenient and efficient vehicle through which to obtain outside financing (subject to compliance with applicable federal and state securities laws).

Corporations in the U.S. are created under state (rather than federal) law. A corporation doing business in Massachusetts may be organized under the Massachusetts Business Corporation Law or under the corporation law of another state, such as Delaware. Many U.S. companies (including many doing business in Massachusetts) choose to incorporate under Delaware law. Publicly-held companies, in particular, may wish to take advantage of particular features of the Delaware Corporation Law which, for example, may permit added flexibility in matters of corporate governance such as stockholder voting, or provide protection against hostile take-overs. Those provisions

may provide little or no advantage, however, to a non-U.S. firm that has a wholly owned subsidiary in the U.S. You should consult with qualified Massachusetts counsel before selecting Delaware or another state as the jurisdiction in which to organize a corporation that will do business in Massachusetts.

An important preliminary step in organizing a corporation under the Massachusetts Business Corporation Law is, of course, to choose a name for the corporation. The name should be sufficiently distinguishable as to avoid confusion with any other corporation or entity organized or qualified to do business in Massachusetts, and must contain a term, such as “Corporation,” “Incorporated” or “Inc.,” identifying the business as a corporation. It is advisable to arrange for a search to confirm that the desired name is available, and, if so, to reserve it in advance with the Secretary of State of Massachusetts.

A Massachusetts corporation is organized by filing Articles of Organization with the Secretary of State of Massachusetts, accompanied by the payment of a relatively modest filing fee. The information required to be included in the Articles of Organization is specified by the Massachusetts Business Corporation Law, and is not extensive. The Articles must be signed and filed by one or more incorporators, who may or may not be employees or principals of the non-U.S. stockholder. It is not necessary to disclose in the Articles (or otherwise) the identity of the stockholders. The Articles of Organization become effective, and the corporation comes into existence, immediately upon filing of the Articles with the Secretary of State, unless a later date is specified. The entire process can be accomplished within a matter of days, if necessary.

Contemporaneously with the filing of the Articles of Organization, the incorporators adopt resolutions electing initial officers and directors of, and adopt by-laws for, the new corporation. The persons elected as the initial directors of the corporation then typically adopt other preliminary resolutions, for example, directing the opening of a bank

account, approving forms of corporate seal and stock certificate, and authorizing the issuance of capital stock of the corporation to its stockholder or stockholders.

The day-to-day management of the corporation is carried out by the officers of the corporation, under the general supervision of the Board of Directors. The Board of Directors appoints the officers of the corporation, generally annually. Also, the stockholders of the corporation hold an annual meeting at which directors are elected for the ensuing year. Meetings of the stockholders and directors of a Massachusetts corporation may be held within or without the U.S. However, it is not necessary to hold formal meetings of the stockholders or Board of Directors, since under the Massachusetts Business Corporation Law any action that can be taken at such a meeting can also be taken by a telephonic meeting or unanimous written consent of the stockholders or directors, as the case may be, without the holding of an actual meeting.

A Massachusetts corporation need not have more than three directors (though it may, if desired, have more); a corporation with only a single stockholder need not have more than one director. Directors are not required to be officers, employees or stockholders of the corporation, nor need they be residents or citizens of the U.S. The officers of the corporation must by statute include a President, a Treasurer and a Clerk; any number of Vice Presidents and other officers are also permitted. Officers may, but need not, be directors, and one person may serve in any one or more of the statutory offices, as well as acting as a director. Officers need not be stockholders or U.S. residents or citizens. However, if the Clerk of the corporation is not a resident of Massachusetts, a resident agent must be appointed for the corporation.

Shares of stock in a Massachusetts corporation may be owned by any natural person, corporation or other entity, including non-U.S. citizens or entities. There is no statutory minimum investment for a Massachusetts corporation, and, subject to certain limitations, stock can be issued for cash, promissory notes, services or other property. (You should be aware, however, that inadequate capitalization of a Massachusetts corporation may risk loss of the limitation of liability of its shareholders.)

A Massachusetts corporation can own or deal in real estate or any other form of property, and, with limited exceptions (for example, the practice of law, medicine or another profession) can engage in almost any business activity.

Record Keeping and Filing Requirements

To maintain the limited liability of its shareholders, a Massachusetts corporation must observe the formalities of corporate form, such as the holding of regular meetings (or actions by written consent) of its shareholders and directors, maintenance of corporate minutes and stock records, proper accounting for the property of the corporation, and avoidance of commingling of funds of the corporation with those of its shareholders. A Massachusetts corporation must also file with the Secretary of State of Massachusetts each year a report of condition (or "Annual Report"), and must also notify the Secretary of State in writing of the occurrence of certain events (such as the relocation of its principal office, or changes in its directors or statutory officers). Failure to file the Annual Report can result in imposition of fines and, if the failure continues for two or more consecutive years, can result in the involuntary dissolution of the corporation by the Secretary of State.

Qualification in Massachusetts of a Corporation or Partnership

As a condition to its conducting business in Massachusetts, a foreign corporation or limited partnership (that is, one organized under the laws of any jurisdiction other than The Commonwealth of Massachusetts) must file with the Secretary of State of Massachusetts, a foreign corporation certificate or application for registration as a foreign limited partnership, as the case may be. Failure to file the necessary certificate or application can result in the imposition of fines and will prevent the corporation or partnership from bringing suit in any Massachusetts court (at least, until the necessary certificate or application has been filed). Foreign corporations (but not foreign limited partnerships) are also required to file annual certificates of condition.

Using an Assumed Name

Any person or entity that conducts business in Massachusetts under an assumed name (that is, any trade name or title other than his or its own legal name) must file, with the city or town clerk of each municipality in which it maintains an office, a certificate (often referred to as a “doing business” or DBA certificate) stating his or its legal name.

(No such certificate needs to be filed, however, for a corporation doing business under its true corporate name.)

Issuing Shares and Other Securities

Both federal law and Massachusetts law regulate the offering or sale of securities. In this connection, the term “securities” includes many forms of investment in an enterprise, and is not limited to the purchase of a common equity interest. Filings may need to be made with appropriate government agencies and specified disclosures may need to be made to prospective investors before securities can be offered or sold to certain classes of persons. For this reason, a non-U.S. business proposing to seek outside financing for a venture in the U.S. should consult with qualified counsel before initiating contacts with prospective investors, to ensure compliance with applicable federal and state securities law.

JOINT VENTURES

A foreign business that wants to do business in the U.S. may desire the assistance of a U.S. business in areas such as manufacturing, marketing and product distribution, particularly if the foreign business has not previously operated a business in the U.S. In that situation, the foreign business may find it advantageous to enter into a joint venture with the U.S. business. A properly structured joint venture will enable a foreign business to obtain assistance in needed areas, obtain guidance and gain experience in conducting business in the U.S., and make contacts in the U.S. business community. The foreign business may then, in the future, proceed on its own, either with a new business activity or by buying out the interest of its U.S. venture partner.

A joint venture arrangement may be tailored to fit any business, whether in the real estate, manufacturing, retailing, service, or any other sector of the U.S. economy (with limited exceptions for certain regulated industries in which foreign participation may be restricted). Massachusetts law permits great flexibility in structuring joint venture arrangements. Joint ventures are, however, complex arrangements requiring the consideration, analysis, and resolution of legal issues in a diverse range of specialties, including tax, anti-trust and intellectual property. Foreign businesses considering a joint venture arrangement should carefully select U.S. legal counsel with the experience and expertise to advise them in these areas.

Structure

As previously mentioned, a joint venture is not a specific type of legally constituted entity, as is a corporation or partnership, but is merely a generic term used to indicate the existence of a working relationship between parties who join together in a common enterprise. The manner in which the parties join together may vary and will be determined by a number of factors. For example, if the foreign business does not require substantial assistance, requires assistance in a narrowly defined area, or requires assistance for only a short period of time, its strategy should probably be to enter into a contract with a U.S. company to provide the services

required. If, however, the foreign business requires more substantial services and desires to establish a longer-term relationship with the U.S. business, the better strategy would be to form a joint venture entity to conduct the business.

The foreign business will want to be insulated from liability for financial obligations and for liabilities arising from the conduct of the U.S. business, while at the same time being active in management and controlling the business. As discussed in the section on Forms of Doing Business in the United States on page 1, general partners of a partnership are liable for the partnerships' obligations and limited partners of a limited partnership avoid liability only if they do not participate in the control of the business. As a result, a foreign business seeking both insulation and active management and control should not enter into a partnership directly with its U.S. joint venturer.

There are two approaches most advantageous to the foreign business in organizing a joint venture. The first approach is for the foreign business to organize a U.S. subsidiary corporation. That corporation would then form a partnership with the U.S. joint venturer. The second approach is the formation of a U.S. corporation jointly owned by the foreign business and the U.S. joint venturer. A foreign business that uses either of these two approaches and, in fact, maintains an arms-length relationship with the joint venture would generally achieve its goal of insulation from liabilities arising from the business of the joint venture. In addition, the foreign business would generally not be subject to the jurisdiction of U.S. courts. There are, however, exceptions. For example, a foreign business may subject itself to jurisdiction over product liability claims in the U.S. merely by sending its goods into the U.S. A foreign business whose products are sold, or are used as components in products that are sold, through a joint venture in the U.S. should consult U.S. legal counsel to determine whether, regardless of the form of joint venture entity selected, it is prudent for the foreign business to maintain product liability insurance.

Regardless of the legal form chosen through which the business of the joint venture will be conducted, the terms of the venture should be negotiated and documented in detail. Although legal counsel will include standard provisions developed through experience to protect the foreign business, there are many areas that will require negotiation. The joint venture documents should, for example, explicitly describe each party's present and future contributions to the venture in terms of capital, management, technology, intellectual property rights, manufacturing facilities, product distribution and the like; each party's ownership interest in, and rights to receive distributions of profits of, the venture; the duration and manner of winding up the venture; governance of the venture; particularly in the case where each venturer has an equal ownership interest, a mechanism for dispute resolution; and restrictions on transfer of the venture's interests in the joint venture. Depending on its long-term U.S. strategy, the foreign business may also find it advantageous to negotiate, at the inception of the venture, a right to buy out its U.S. partner in the future.

Tax Considerations

Tax consequences will be a significant consideration in the type of joint venture entity selected. The entity formed to carry on the business of the joint venture will be subject to U.S. federal and state taxes. If the venture is conducted through a corporation, the corporation will be subject to those taxes. If the venture is conducted through a partnership, then all items of the partnership's income, losses, deductions, and credits will be passed through the partnership to its partners, who will be responsible for payment of taxes. In addition, the tax treaty between the U.S. and the country of the foreign business will affect the tax liability on income the foreign business receives from the joint venture. Many tax treaties require withholding of taxes in the U.S. on certain types of payments made to foreigners.

B U S I N E S S F I N A N C I N G

This section of the guide is a brief description of some of the more common types and sources of financing generally available to establish and finance the U.S. operations of a foreign business. Because of the many types of financing that exist and the many variations of each type, and because certain types of financing are more suitable for particular businesses, a more detailed description is beyond the limited scope of this guide. The point to keep in mind is that both U.S. and Massachusetts law allow great flexibility in tailoring financing packages to the needs of particular industries and to individual businesses within those industries. Financially astute business people working with experienced legal counsel will be able to structure a financing package that is appropriate for the particular business and which can be implemented within the framework of U.S. and Massachusetts laws and the requirements of lenders and investors.

Equity Financing

All businesses require an adequate level of equity capital. What is adequate varies by industry and by the circumstances of a particular company within an industry. A business that anticipates substantial borrowing to finance its start-up costs and operations will need to satisfy its lenders that it is adequately capitalized. The amount of equity capital should be finally determined only after presentation to, and approval by, prospective lenders of a pro forma balance sheet for the business.

As a general matter, the U.S. does not restrict the flow of funds between the U.S. and other countries. Subject to applicable reporting requirements described under the heading "Reporting Requirements for Foreign Direct Investment" on page 52, funds may be brought into the U.S. without limitation as to amount and, together with any profits earned, may be repatriated without restriction as to amount. Thus, the foreign business may bring into the U.S. funds needed to capitalize its U.S. operations, and funds that are no longer needed in the business or which are

realized when the business is wound up may be repatriated and converted into foreign currency at then prevailing exchange rates.

The foreign business that desires to retain sole ownership of its U.S. operations will provide all the equity capital for the business. For those foreign businesses that do not object to sharing ownership with others, various sources of equity capital are available. Commercial banks in the U.S. do not provide equity capital. Investment banking firms, however, may be a source of equity capital, not only investing their own funds, but also arranging for the investment of equity funds by their customers. This source of equity capital will generally be available, however, only if the foreign firm is an established business. Most of the major investment banking firms in the U.S. operate on an international basis, facilitating the ability of a foreign investor to arrange equity financing in the U.S.

Equity capital raised from others to establish a business in the U.S. will take the form of either common stock or preferred stock. Although Massachusetts law permits the creation of different classes of common stock, a purchaser of common stock would have the same rights per share as the foreign business to dividends and distributions. It is more likely that the third-party equity investor will want to purchase a class of preferred stock, which entitles the holder to a return of its investment and possibly a fixed yield on that investment, before any amounts are paid to the foreign concern if the business is wound up, and which may entitle the holder to a specified level of dividends before any dividends are paid to the foreign concern. The preferred stock issued in such a transaction will likely be convertible into common stock at an agreed conversion rate, or may entitle the holder to participate with holders of common stock in dividends and other distributions after the preferred stockholder has been paid the preferential dividends and distributions to which it is entitled.

The issuance of equity securities involves the negotiation of many issues, including dividend and liquidation rights and preferences, voting rights, preferred stock conversion rights, rights to appoint representatives to the board of directors, information reporting, affirmative and negative operating covenants, remedies in the event of failure to make preferred payments when due, rights to participate in future financings of the business, rights to participate in sales of shares by other equity holders, and rights of first refusal if either the foreign concern or U.S. investor desires to sell its shares. It is likely that the U.S. investor will, in addition, want to provide an exit strategy for its investment. This might take the form of an option to require the purchase of the U.S. investor's shares after some period of time or upon the occurrence of an agreed event, a right to participate in a public offering of shares by the company, or a right to require the company to register the public sale of the U.S. investor's shares. Legal counsel experienced in negotiating equity placements will be familiar with the many pitfalls in negotiating these and other issues that arise in private equity placements.

Venture capital, although a major source of equity capital in the U.S. for smaller and developing businesses, may not be an attractive financing alternative for a foreign business seeking to operate in the U.S. Venture capitalists have traditionally preferred rapid-growth businesses with the potential of a public offering. They will, therefore, typically require rights to force registration of the public sale of their equity holdings. In order to assure liquidity, they may also require the business to buy out their interest at a predetermined time.

Venture capitalists will ordinarily demand a high degree of control to protect their investment and can be expected to react relatively quickly to insist on changes when a business does not perform as expected. They may also insist on provisions giving them control of the board of directors or actual ownership control in the event of default.

Given the inherent risk in venture capital investing, high returns on investments are necessary to balance the successes with the failures in the venture capitalist's portfolio. Consequently, the cost of venture capital financing tends to be quite high.

For the foregoing reasons venture capital may not be an attractive source of equity financing for a foreign business.

With some exceptions, the public securities markets are generally for mature businesses, although market conditions will, at times, allow less developed businesses with high growth potential to make initial public offerings at an earlier stage of development. The public securities markets are highly regulated under a system based on the concept of full disclosure of all material information. A company that offers its securities to the public is subject to extensive public reporting requirements, both at the time of the offering and on an ongoing basis. "Insiders," including officers, directors, and significant equity holders, may trade in securities of their company based only on information available to the general public, and are subject to various other securities trading restrictions.

Debt Financing

Debt financing is available to satisfy business needs at various stages of growth from start-up to mature businesses. The U.S. debt market is, however, segmented. Different lenders provide different types of loans, and some lenders specialize in providing financing to businesses in specific industries. A foreign concern must be careful to select lenders that are knowledgeable about the foreign concern's industry and capable of structuring a financing package that suits the particular needs of the foreign concern's business. The following is a brief description of some of the more common types and sources of debt financing.

Asset-Based Loans

Asset-based loans generally provide short-term credit in the form of demand loans, seasonal lines of credit and single purpose loans for the purchase of specific assets. The amount of financing available is usually based on a percentage of the borrowing company's qualified assets.

Working capital financing involves loans made against percentages of the borrower's accounts receivable and inventory, which the lender will accept as qualified collateral. The lender may, in addition, take a security interest in other assets, which are not qualified to be included in computing the borrowing base for loans to the borrower. Commercial banks and commercial credit companies are the most common source of this type of financing.

Equipment financing may be available both to finance the purchase of new equipment and to realize cash from existing equipment. While maximum loan value and more advantageous financing terms will be available for the financing of new equipment, lenders will provide financing against a percentage of the value of existing equipment. The types of assets that may be financed in this manner extend beyond conventional equipment and machinery and include furniture, office partitions and virtually any other fixed assets. Typical sources of this type of financing are commercial banks, commercial finance companies and leasing companies. In addition, sellers of fixed assets often provide direct financing to their customers.

Term Loans

For more mature companies with predictable cash flows, banks, insurance companies and pension funds provide longer-term loans. Long-term loans may have either floating or fixed rates of interest. These loans are generally unsecured and, as a result, long-term lenders for protection rely heavily on extensive affirmative and negative covenants that set forth parameters for the conduct of the borrower's business. Long-term loans are generally used to fund permanent working capital needs and expansion of capital assets.

Subordinated Loans

Subordinated loans, sometimes referred to as "mezzanine" loans, are term loans that are subordinated in right of payment to other loan obligations of the borrower, often obligations for loans from secured creditors and banking institutions. The term "subordination" has little intrinsic legal meaning. The terms of subordination must be carefully negotiated in detail between the senior and subordinated lenders, and must clearly set forth the relative priorities of the classes of lenders to the cash flow and assets of the borrower and the circumstances under which the subordi-

nated lender is entitled to receive payments and exercise its remedies as a creditor in the event of a payment or other default on its loan.

Because of the inherently greater risk that results from subordination, subordinated lenders require a considerably higher return than do senior lenders. Particularly in the case of earlier stage companies, the near-term projected cash flow may not be sufficient to pay all the interest on both the senior and the subordinated debt. In these situations, the subordinated lender may be willing to permit payment of a portion of its interest on a current basis and to defer payment of the balance to the time when the borrower's projections reflect adequate cash availability. The subordinated lender is likely to require that any deferred interest itself bear interest at an agreed rate. In addition, often only part of the subordinated lender's return will be reflected in the interest rate. The balance of the return is more speculative and is provided by "equity kickers," often in the form of warrants to purchase common stock of the borrower at a favorable price. In appropriate situations, a borrower's capital structure may include more than one class of subordinated debt. In that event, the terms of subordination of the more junior lenders will be negotiated separately with both the senior lender and the holders of the more senior subordinated debt.

Subordinated debt financing is generally provided by insurance companies, venture capital funds that focus on later-stage growth companies, and specialized mezzanine lending funds. Because this debt is subordinate to the borrower's senior debt, senior lenders will often view it as equity in performing their credit analysis.

Trade Credit

Trade credit is so oriented towards a single purpose and so short term that it is often overlooked as a source of capital for general purposes. To the extent, however, that a company is able to obtain credit from its suppliers and convert the merchandise purchased into cash to pay the suppliers within the credit term, the company reduces its need to borrow from banks and commercial credit companies. The stage of development of a business has a significant effect on its ability to obtain trade credit. In the start-up phase, trade credit will be established based on financial condition, while later emphasis will shift to consistency of earnings and the payment record of the business. A more mature business with a supplier's confidence may be able to negotiate credit terms, although suppliers are limited in this respect by the Robinson-Patman Act, which prohibits discrimination in price, terms, or conditions of sale among buyers who compete with each other. (See "Antitrust and Trade Regulation" on page 50.)

Public Securities Markets

Debt financing in the public securities markets is available to later-stage, substantial borrowers. This type of financing is generally long term and often unsecured, and may be either at a fixed or variable interest rate. While the cost of money tends to be lower and operating covenants tend to be less restrictive in publicly-placed debt than in privately-placed debt, the cost of issuance, and ongoing transaction and reporting costs tend to be significantly higher in the public markets. In addition, the interests of holders of publicly-issued debt are represented by a trustee with fiduciary responsibilities and which generally can agree to amendments or to waivers of default only with the approval of a specified percentage of the holders of the debt. As a result, issuers of publicly-held debt will encounter less flexibility and greater delay in dealing with defaults, and with amendments necessitated by changes in business circumstances.

LABOR AND EMPLOYMENT RELATIONS

Productive and skilled employees are essential for the success of any business. Massachusetts is fortunate in having a highly-educated and disciplined workforce. When recruiting people to staff a business, it is important to be familiar with the basic rules of labor and employment law in the United States in three areas: hiring employees; establishing the terms, conditions and benefits of their employment; and terminating employees. Each of these areas is discussed briefly here.

Hiring

Most employees in the U.S. do not have written employment contracts. They are hired to work on what is known as an “at-will” basis. This means that they are not employed for any definite period of time, and either the employee or the employer may terminate the employment relationship without prior notice at any time and for any reason, as long as the reason is not an unlawful one.

Employers who want to employ persons on an at-will basis should have their employment application forms, offer letters, employee handbooks and any written personnel policies and procedures reviewed by a lawyer to ensure that they do not inadvertently create enforceable contracts of employment for a particular term.

Some employees, such as high-level executives, may have written employment contracts that establish a particular period of employment and describe the terms and conditions of the employment relationship. Those contracts are usually drafted with the assistance of counsel.

Other employees (for example, hourly-paid workers in certain manufacturing jobs) are represented by labor unions that have negotiated collective bargaining agreements, which set the terms and conditions of their employment relationship. The number of employees represented by labor unions in the U.S. has been declining in recent years, and it is unusual for labor unions to represent employees who work for high-technology and many other businesses in Massachusetts. Employers in the U.S. are prohibited by both federal and state laws from discriminating in the hiring of employees on the basis of race, sex (including pregnancy),

age (applies to people 40 years and older), color, religion or national origin. Federal and state laws also prohibit discrimination against qualified handicapped persons who are able to perform the essential functions of a job with or without reasonable accommodations. Massachusetts state law also prohibits discrimination based on a person's sexual orientation or genetic information.

A federal law, the Immigration Reform and Control Act, makes it unlawful to employ aliens in the U.S. who do not have appropriate visas authorizing them to work. A separate section on “Immigration” on page 18 of this guide describes the types of visas available under U.S. law.

Larger employers (50 or more employees) who do business with the federal government, and have a contract in excess of \$50,000, may have to prepare written “affirmative action plans” in an effort to recruit and promote qualified women and minority people in their workforces.

Terms and Conditions of Employment

For the most part, employers in the U.S. are free to determine the compensation and benefits for their employees without any regulation by the government. There are, however, some important exceptions to this general rule, as described more fully below.

Wages

A federal law, the Fair Labor Standards Act, requires most employers to pay their employees a minimum wage (\$5.15 per hour effective September 1, 1997). Additionally, it requires employers to pay overtime premiums at the rate of one and one-half times an employee's regular rate of pay for all hours worked in excess of 40 in a week. Except in the case of minor children, there is no limit on the number of hours that employees can work in a week as long as they receive one full day of rest (usually Sunday) in each seven-day period. Certain salaried employees who are employed as executives, professionals or administrative personnel are exempt from these minimum wage and overtime pay requirements. Massachusetts law is essentially the same as the federal law concerning these matters, except that the minimum wage was increased to \$6.75 per hour effective

January 1, 2001 under state law. In addition, by law the Massachusetts minimum wage cannot be less than \$0.10 higher than the effective federal minimum rate.

Workers Compensation for Injured Employees

In Massachusetts, as in every other state, employers must provide workers compensation benefits to employees who are injured during the course of their employment. These benefits are typically provided through private insurance that the employer obtains at or before the time employees are first hired. The cost of the insurance is determined by factors such as the size of the employer's payroll, the nature of the employer's business (for example, construction, manufacturing or office work), and the employer's prior record concerning benefits paid to injured employees. The benefits that injured employees receive are set by law. The benefits are the employee's sole remedy for work-related injuries or illnesses, and employees may not bring court claims against their employers for additional benefits.

Unemployment Compensation for Terminated Employees

Employers must also pay a quarterly tax on part of their total payroll to fund unemployment compensation benefits for employees who are terminated involuntarily. The tax rate for each employer is determined in part by how much money the state needs to fund this program and in part by the claims experience of each individual employer.

Vacations and Holidays

Neither federal nor Massachusetts law requires an employer to provide employees with either vacation time off or vacation pay. It is common, however, for employers to provide employees with paid vacation time off. The amount of paid vacation a particular employee receives is typically determined by his or her length of service or position. It is not unusual for employees to receive from 1 to 4 weeks of paid vacation time off in a year.

Time off for holidays is regulated by state law only. In Massachusetts, most employers are required to allow employees to take off the whole day on five holidays

(Memorial Day in May, Independence Day on July 4, Labor Day in September, Thanksgiving Day in November and Christmas Day on December 25) and to take off half a day in the morning on two days (Columbus Day in October and Veterans' Day in November). Employers are not required by law to pay employees for holiday time off, but it is a well-established custom to do so. Employers sometimes pay overtime premiums to those who are required to work on a holiday, although in Massachusetts such premium pay is only required as a matter of law for people who work in retail establishments on New Year's Day, Columbus Day or Veterans' Day. Many employers are also required to allow employees to take unpaid time off on Sundays, except that there are exemptions from this law for certain businesses. Retailers must pay time and a half on Sundays to their hourly employees.

Health Insurance

Employers are not required by law to provide health insurance benefits for their employees, but the majority of employers do voluntarily provide some type of group health insurance coverage in order to attract and retain capable employees. The cost of such insurance can vary substantially. Typically, an employer either pays a percentage or all of the cost of the insurance.

Once an employer does adopt a plan that provides health benefits for employees or their dependents, there are federal and state laws that establish certain requirements for these plans. For example, there is a federal law that applies to employers with 20 or more employees called the Consolidated Omnibus Budget Reconciliation Act (COBRA), which allows terminated employees and certain other participants in group health plans to continue their coverage in such plans at their own expense after they leave their employment. There is also a state law known as mini-COBRA that applies to companies in Massachusetts with 2-19 employees.

Although not required by law, it is customary for employers to allow employees occasional days of absence due to sickness or injury without loss of pay. Many employers have detailed sick leave policies specifying the number of days allowed per year or other period, and similar matters.

Leaves of Absence

Massachusetts law requires employers to grant an eight-week unpaid maternity leave for the purpose of giving birth or adopting a child. The Massachusetts Commission Against Discrimination has written guidelines to help explain the state's law.

A federal law, the Family and Medical Leave Act of 1993 (FMLA), requires employers who employ 50 or more people to allow certain employees to take up to 12 weeks of unpaid leave in a 12-month period for one or more of the following reasons: a) for the birth and care of a newborn child of the employee; b) for the placement with the employee of a son or daughter for adoption or foster care; c) to care for an immediate family member (spouse, child or parent) with a serious health condition; or d) to take medical leave when the employee is unable to work because of a serious health condition.

During a FMLA leave, an employer must maintain an employee's group health insurance coverage on the same terms as before the leave began. Upon return from a FMLA leave, an employee must be restored to his or her original job or to an equivalent job.

Massachusetts employers who are subject to the FMLA are subject to the Massachusetts law known as the Small Necessities Leave Act (SNLA). Under the law, employers must permit eligible employees to take a total of twenty-four hours of leave in a twelve-month period, in addition to leave under the FMLA, to participate in school activities directly related to the educational advancement of a child of the employee, such as parent-teacher conferences, or interviewing for a new school; to accompany the child of the employee to routine medical or dental appointments, such as check-ups or vaccinations; and to accompany an elderly relative of the employee to routine medical or dental appointments or appointments for other professional services relating to the elder's care, such as interviewing at nursing or group homes.

Retirement Benefits

Under the "social security" program administered by the federal government, all employers must withhold a percentage of each employee's wages each pay period and forward

those amounts quarterly to the federal government, together with an additional wage-based tax that is paid by employers, to fund retirement and other benefits.

It is also fairly common for employers to provide voluntarily some type of program to enable employees to accrue retirement benefits. Retirement and other benefit programs are regulated by a federal law known as Employee Retirement Income Security Act (ERISA). It has become more common recently for employers to establish plans that enable employees and/or their employer to make tax-deferred contributions to individualized retirement benefit plans. This is a complex area of the law that requires special legal assistance.

Life and Other Insurance

Employers sometimes voluntarily provide group term life insurance, accidental death and dismemberment insurance and/or long-term disability insurance for their employees at either the employer's or the employee's cost.

Safety and Health

There is a federal safety and health law called Occupational Safety and Health Act (OSHA) that establishes minimum safety standards that employers must follow. Depending on the nature of the business, compliance with these regulations can require a significant effort.

Labor Unions

Another federal law, the National Labor Relations Act, protects employees from discrimination or termination for engaging in collective activities or organizing to form labor unions for the purpose of bargaining with their employer about wages, hours of work or other terms and conditions of employment. When a union represents employees, many of the wage and benefit policies that are described above as voluntary may become subject to collective bargaining with the union, and may become mandatory under an agreement negotiated with the union. This is a complex law, and special legal assistance is required if, for example, you are acquiring a business that has union-represented employees.

Protecting an Employer's Assets

Employers sometimes require employees to sign certain written agreements as a condition of obtaining employment in order to protect the employer's confidential information,

to secure the employer's right to certain intellectual property or to prohibit employees from leaving their employment and going into competition with them. Such agreements are particularly important and common for employers who are engaged in high technology businesses. Employment agreements concerning patents, inventions, copyrights, noncompetition, confidential information, conflict of interest rules and similar matters are usually drafted with the assistance of a lawyer.

Terminating Employees

"At-will" employees (that is, employees who do not have employment contracts for a particular term or who are not covered by union-negotiated collective bargaining agreements) may be terminated at any time and for any reason, as long as the reason is not an unlawful one. There are no particular procedural requirements that must be followed in terminating an at-will employee. Examples of unlawful reasons for termination include discharging an employee because of his or her race, sex (including pregnancy), age (applies to people 40 years and older), color, religion, national origin and disability or handicap (if the person is qualified to perform the essential functions of the job with or without reasonable accommodations). In Massachusetts, at-will employees may not be terminated for refusing to perform an unlawful act (such as committing perjury) or for performing important public duties (such as serving on a jury).

Employers are not required to inform terminated employees, either verbally or in writing, of the reason for their termination, although it is customary to do so. It is important that an employer give the complete and honest reason for an employee's termination if it chooses to give a reason.

Employees who are covered by union-negotiated collective bargaining agreements ordinarily can be terminated only for "just cause."

In Massachusetts, terminated employees are entitled to receive all of their wages, including any accrued but unpaid holiday or vacation pay, at the time of their termination.

Employers cannot withhold from the final paycheck of a former employee sums they believe are owed to them by the employee, unless there is a definite amount of money at issue and there can be no dispute that the money is owed.

Employers must give employees a specific unemployment compensation claim filing information pamphlet issued by the Division of Employment and Training (DET), at or immediately after the employee's termination. The DET requires employers to fill in on the pamphlet the name and address of the employer and the employer's DET identification number.

Terminated employees are not ordinarily entitled to receive severance pay. Some employers voluntarily provide severance pay to terminated employees, particularly if their terminations result from "layoffs": a workforce reduction due to the elimination of redundant positions or for other economic reasons. Plans that provide employees with severance pay should be reduced to writing and conform to certain other requirements in ERISA.

There is a federal law called Worker Adjustment and Retraining Notification Act (WARN) that requires employers with 100 or more full-time employees to provide 60 days written notice to employees or their union representatives and other officials in the event of a "plant closing" or "mass layoff" at a single site of employment. Massachusetts also has a plant closing law that applies to employers with 50 or more employees and, in the event of either a full or partial plant closing, requires the continuation of group health insurance coverage on the same terms as before the closing for 90 days after employees are terminated.

As noted above, involuntarily terminated employees are ordinarily entitled to unemployment compensation benefits, which are paid directly by the state government. Additionally, under the COBRA statute noted above, terminated employees and their dependents are entitled to continue their group health insurance coverage at their own expense for various periods up to as much as 36 months after particular events occur.

IMMIGRATION

The U.S. has a complicated system, administered by the Immigration and Naturalization Service and the State Department, for the regulation of foreign nationals coming to the U.S. To enter and remain in the U.S., a foreign national must qualify for and, in most instances, obtain a visa. Broadly speaking these visas fall into two categories: temporary non-immigrant visas and permanent resident visas.

Temporary, Non-Immigrant Visas

Non-immigrant visas are issued to foreign nationals who are coming to the U.S. for a temporary purpose and who will maintain a permanent residence abroad. A non-immigrant visa permits a foreign national to enter the U.S. for a specific purpose and for a limited period of time. Most classes of non-immigrant visa do not permit the foreign national to work in the U.S., and many require advance approval from the Immigration and Naturalization Service (INS).

The most common visa categories utilized by foreign nationals include:

- B-1:** Visitor for business purposes coming to the U.S. on a short trip for a foreign employer. Typically, an individual's initial admission in this status is limited to a maximum of six months. This visa status does not normally authorize an individual to work for a U.S. employer. The U.S. has implemented a visa waiver program that enables foreign nationals of many countries to enter the U.S. in B-1 status without obtaining a visa in advance.
- B-2:** Temporary visitor for pleasure (tourist). The visa waiver program available to nationals of certain countries also applies to the B-2 visa category.
- H-1B:** Foreign national in a "specialty occupation" that normally requires attainment of at least a bachelor-level degree, coming to the U.S. to perform services requiring such skills. In addition, the employer must make certain attestations concerning wage levels and conditions of employment. The INS must approve a petition in advance, and the maximum length of stay in H-1B status is typically six years.
- H-2:** Other skilled workers who are coming temporarily to the U.S. and who will not displace a U.S. worker. Entry in H-2 status requires prior approval of a labor certification application by the Department of Labor, as well as prior approval by INS. The maximum length of stay is typically one year.
- H-3:** Foreign national coming to the U.S. to complete a formal training program, which can include training programs maintained by U.S. employers. The principal activity in the training program cannot be productive employment. Prior approval by INS is required, and the length of stay is defined by the duration of the training program.
- L-1:** Intracompany transferee who is an executive, manager or individual possessing specialized knowledge of an international company's products or operations. The individual must have worked abroad for the company or an affiliate for at least one year in the immediately preceding three years. Prior approval by INS is required, and the maximum period of stay is five to seven years.
- TN-1:** This visa status is available only to Canadian and Mexican nationals pursuant to the North American Free Trade Agreement (NAFTA). It permits qualified Canadian and Mexican professionals to enter the U.S. without first obtaining prior INS approval or a visa. "Professionals" generally includes individuals within certain job categories listed in NAFTA.
- O:** Foreign national of "extraordinary ability" in the sciences, arts, business or education, as demonstrated by sustained national or international acclaim. This requires advance approval by INS. An individual can be admitted in this status for whatever period of time is required to complete the purpose of his/her trip.

- P:** Performing artists and athletes who perform at an “internationally recognized” level. Advance INS approval is required, and the foreign national is admitted for the period required for his/her performance.
- E-1:** Foreign national coming to the U.S. pursuant to a treaty of trade or commerce to foster international trade between the U.S. and his/her native country. To qualify, there must be a treaty of trade between the U.S. and the foreign employer’s country, the individual must have that same nationality as the employer, and there must be substantial trade by the company between the U.S. and that foreign country. The U.S. consulate in the foreign country can approve these visas, and there is no fixed limit on how long the individual can remain in the U.S.
- E-2:** Foreign national coming to the U.S. pursuant to a treaty of trade between the U.S. and his/her native country in connection with a substantial U.S. investment. Again, there must be an appropriate treaty of trade, the visa can be issued by the U.S. consulate without prior INS approval, and there is no fixed limit on the length of stay.
- F-1:** Students coming to the U.S. to pursue a course of study leading to a degree. The individual is admitted for the duration of his/her studies and, in certain circumstances, can receive authorization to work.
- J-1:** Exchange visitor coming to the U.S. for purposes of an international exchange of knowledge. These programs require prior approval from the U.S. Information Agency and, in some instances, participants in such a program must return to their native country for two years after completion of the program. J-1 exchange visitors may be eligible to work in certain circumstances.

Permanent Residence

A permanent resident visa allows a foreign national to live and work indefinitely in the U.S. A foreign national can seek permanent resident status on the basis of a qualifying job offer from a U.S. employer, a qualifying investment in the U.S., or a qualifying relationship with a U.S. citizen or permanent resident. Because there are a limited number of permanent resident visas available each year in many categories, there can often be a substantial waiting period to obtain permanent residence. To qualify for permanent resident status on the basis of a job offer, a foreign national must fit into one of the following categories:

- *Priority Workers:* Individuals with extraordinary ability in the arts, sciences, education, or business, outstanding professors and researchers, and certain executives and managers of multinational companies.
- *Professionals:* Individuals holding advanced degrees (not a bachelor’s degree) and individuals of exceptional ability.
- *Skilled Workers:* Individuals with a bachelor’s degree or who will perform duties which normally require at least two years of specific training or experience.
- *Other Workers:* Low-skilled or unskilled labor.

For individuals in the latter three categories of Professionals, Skilled Workers, and Other Workers, the employer must normally first obtain a labor certification from the U.S. Department of Labor. To do so, the employer must demonstrate, through the completion of prescribed recruitment activities, that there are no qualified U.S. workers available to undertake the work. INS can waive the labor certification process for Professionals whose employment is deemed to be in the “national interest.”

Investors

To qualify for permanent residence on the basis of an investment in the U.S. a foreign national must invest at least \$1 million (this requirement is reduced to \$500,000 if the investment is made in certain economically disadvantaged areas) in a new venture that can be expected to employ at least ten U.S. workers within two years. Alternatively, the investment could also be made in an existing

business that is in economic trouble. To obtain permanent residence through a qualifying investment, the foreign national must file a petition with INS documenting the amount and nature of the investment.

Relationship to a U.S. Citizen or Permanent Resident

The final avenue for obtaining permanent residence is through a qualifying relationship to a U.S. citizen or permanent resident. Spouses, parents (if the child is over 21), and minor children of U.S. citizens are classified as “immediate relatives” and are immediately eligible for permanent residence. Other groups that may be eligible to seek permanent residence on this basis are:

- | | |
|--------------------------|--|
| <i>First Preference</i> | Unmarried sons and daughters of U.S. citizens. |
| <i>Second Preference</i> | Spouses and unmarried children of permanent residents. |
| <i>Third Preference</i> | Married sons and daughters of U.S. citizens. |
| <i>Fourth Preference</i> | Brothers and sisters of adult U.S. citizens. |

To obtain permanent residence on this basis, the U.S. relative must obtain approval by INS of a petition to classify the foreign national as a qualifying relative. In many categories, there is a significant waiting period before the foreign national can become a permanent resident of the U.S.

Employer Sanctions

Since 1986, federal law has made it unlawful for an employer to employ a foreign national who is not authorized to work. Federal law also imposes on employers an affirmative duty to verify and record on an I-9 form the identity and status of every new employee. At the same time, the law prohibits employers from discriminating on the basis of national origin, citizenship status or impending citizenship status. Violation of any of these provisions can result in substantial civil penalties and, in extreme cases, criminal penalties.

THE PROTECTION OF INTELLECTUAL PROPERTY

Many companies count intellectual property among their most valuable assets. The acquisition or right to use intellectual property is the force driving many business transactions. Increasingly, lenders and financiers look to a company's intellectual property assets to support the company's financing needs.

Under federal and Massachusetts law, these intellectual property assets may be protected as patents, copyrights, trademarks or trade secrets. Some assets can also be protected by principles of unfair competition. Some types of intellectual property may be eligible for more than one form of protection. For example, computer programs are often subject to patent, copyright and trade secret protection, and their names are protected as trademarks.

Categories of Protection

Patent Law

Patents are exclusively matters of federal law, governed by the 1952 Patent Act, as amended. The Patent Act provides for three types of patents:

- *Utility Patents*: Protect the utilitarian aspects of a process, machine, manufacture or composition of matter.
- *Design Patents*: Protect the ornamental external design of an article of manufacture.
- *Plant Patent*: Protect only distinct and new varieties of asexually reproduced or cultivated non-tuberous plants.

Eligibility for Patent

The Patent and Trademark Office of the Department of Commerce (PTO) issues patents after evaluation of applications submitted by inventors. To be eligible for a patent, an inventor must demonstrate that the invention, design or plant is novel and non-obvious.

- *Novelty*: The novelty requirement will be satisfied if:
 - (a) the applicant was the first to invent the invention;
 - (b) the invention was not known or used in the U.S.,

or patented or published in any country, before the date of creation by the applicant; and (c) the invention was not in public use or on sale in the U.S. more than one year prior to filing the application for patent with the U.S. Patent and Trademark Office.

- *Non-obviousness*. An invention is "non-obvious" when the differences between the invention and the previously known body of knowledge are such that the invention would not have been obvious to a person having ordinary skill in the art.

Patent Owner's Rights

Once a patent is issued, the patent holder is protected during the term of the patent against (a) the unauthorized use, sale, offer for sale or manufacture of the invention within the U.S., (b) the unauthorized importation of the invention into the U.S. or (c) importation of a product that is made abroad under a process patented in the U.S. The duration of patent protection differs for the different types of patents.

- *Utility and Plant Patents filed after June 8, 1995*: Twenty (20) years from the filing date.
- *Utility and Plant Patents filed or issued before June 8, 1995*: The longer of twenty (20) years from the filing date or seventeen (17) years from the issue date.
- *Design Patents*: Fourteen (14) years from the issue date.

Unlike some foreign jurisdictions, there is no working requirement or compulsory licensing for U.S. patents in most cases. However, patent holders may apply a prohibition on "abuse of patent" to prevent certain restrictive or anti-competitive practices.

International Conventions Concerning Patents

The U.S. is a party to the Paris Convention, the Union for the Protection of New Varieties of Plants (UPOV) and the Patent Cooperation Treaty.

The Paris Convention and the UPOV, as applies to botanical plant varieties, accords the citizens of each member state national treatment and a right of foreign priority. National treatment gives citizens of member states access to foreign patent protection to the same extent as nationals of the foreign state. Foreign priority entitles inventors in member states to the benefit of an earlier filing date if a counterpart patent application was filed abroad, provided that a later application is filed within the priority period, which is one year under the Paris Convention.

The Patent Cooperation Treaty establishes a mechanism for initially filing a single uniform international patent application and extends the priority period of the Paris Convention.

Copyright Law

Most copyrights are also exclusively matters of federal law, governed by the 1976 Copyright Act and its amendments. Copyrights are exclusive rights in works of artistic or intellectual expression.

Eligibility for Copyrights

Copyright protection is available for original works of authorship fixed in a tangible medium of expression. Works of authorship include:

- Literary works (works expressed in words, numbers or other verbal or numerical symbols such as books, lyrics, catalogs, compilations and directories)
- Musical works
- Dramatic works
- Pantomimes and choreographic works
- Pictorial, graphic and sculptural works (two and three dimensional works of fine, graphic and applied art, photographs, prints, maps, globes, charts, technical drawings, diagrams and models)
- Motion pictures and other audiovisual works
- Sound recordings (works that result from the fixation of a series of musical, spoken or other sounds, but not sounds accompanying an audiovisual work)
- Architectural works

Computer Programs. Copyright protection is available for computer programs, as literary works, to the extent that the program incorporates the programmer's expression of original ideas, as distinguished from the ideas themselves. Unlike other literary works, computer software generally cannot be rented without authorization of the copyright holder.

Mask Works. Mask works, such as the two-dimensional and three-dimensional features of the shape, pattern and configuration of the surface of the layers of a semiconductor chip product, are accorded sui generis protection under Chapter 9 of the Copyright Act. Mask works, though similar to pictorial, graphic and sculptural works, are not afforded the same protection because their configuration is inseparable from the useful object, the semiconductor chip. A mask work may not be reproduced, imported or distributed without the authority of the owner.

Copyright Owner's Rights

Copyright protects the owner from the unauthorized copying, distribution, performance and display of the work and unauthorized creation of translations and other derivative works. Copyright in the U.S. also protects the "moral" rights of attribution and integrity, but only with respect to works of visual art.

Copyright law distinguishes between an idea and an expression of an idea. Only the expression is protected. Thus, copyrights do not protect the owner from use by others of any idea, procedure, process, system, method of operation, concept, principle or discovery revealed by the copyrighted work.

Vesting of Rights

Copyrights in a work automatically vest in the author or joint authors of the work when the work is first set down in tangible form. No registration or filing is necessary. Copyrights remain vested in the authors for the duration of the copyright unless the authors transfer their copyrights by written assignment.

An employer will be the author of a work, and therefore hold the copyrights in the work, in the special case of a "work made for hire." A "work made for hire" is:

- a work prepared by an employee within the scope of his or her employment; or

- a work prepared by a non-employee, if it is specially commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, and the parties expressly agree in a written instrument signed by them that the work shall be considered a “work made for hire.”

A “work made for hire” created by an employee may fall in any of the categories of works covered by the Copyright Act. However, works created by non-employees can become works made for hire only if (a) they fall into one of the special categories listed in the preceding indented paragraph and (b) the parties expressly agree in a signed document that the work is to be considered a work made for hire. If the work does not fall within one of the special categories, the parties may nevertheless agree to assign copyright to the party commissioning the work. In that case, the “author” will be deemed to be the person who actually created the work; the commissioning party will become the owner of copyright by reason of the assignment. Since many consultants, advertising agencies, independent contractors and other non-employees create works that do not fall within the listed categories, ownership of copyrights in such works must be obtained by an express written assignment.

Duration of Copyrights

The duration of copyright protection depends upon who is the author, when the work was created and when federal copyright protection was first obtained. For works created after January 1, 1978 the following terms apply: (The term may not be renewed or extended.)

- A work of an individual author is protected for the life of the author plus seventy years
- Joint works prepared by two or more authors are protected for the life of the last surviving author plus seventy years
- Anonymous works, pseudonymous works and works made for hire are protected for 95 years from the date of publication or 100 years after creation, whichever is shorter

In addition, restoration of copyright is available for certain works of foreign origin that have fallen into the public domain in the U.S., but are still subject to valid copyright in their source countries. Restoration is generally available for works that fell into the public domain in the U.S. due to (a) non-compliance with U.S. formalities, (b) in the case of sound recordings fixed prior to February 15, 1992, lack of subject matter protection, or (c) lack of national eligibility for protection. The owner of a restored copyright must file a Notice of Intent to Enforce copyright in order to restrain parties acting in reliance upon the lapse of rights. Such parties must stop using the work within twelve (12) months after being notified of the restoration of rights.

Formalities

Since 1989, federal law has not required the formalities of notice or registration to establish copyrights. However, it is still advisable to apply a copyright notice to each copy of a work and to register copyrights in a work.

The copyright notice consists of three elements: the word “copyright”, “copr.” or the copyright symbol “©”; the year of first publication; and the copyright owner’s name. Notice can prevent inadvertent infringement and prevent an infringer from mitigating damages by claiming innocent infringement.

Registration is still a prerequisite for many copyright infringement actions for works first published in the U.S., for perfecting security interests in copyrights, for recording transfers of copyright so as to give constructive notice of the transfer, and for recording the copyright with the Customs Office. (Registration is not a prerequisite for a U.S. copyright infringement action, if the work originated in some other Berne Convention member country.) Registration establishes the owner’s title to the work and entitles the owner to claim statutory damages and attorney’s fees in some infringement actions and other benefits.

Moral Rights

Protection for moral rights (or *droit moral*) is much more limited in the U.S. than in some other countries. The 1990 Visual Artists Rights Amendment to the Copyright Act grants to the author of a work of visual art the rights of attribution and integrity for the life of the author, without granting such rights to any other type of copyrightable work.

Right of Attribution: This right allows an author to claim authorship of a work and to prevent the use of his or her name as the author of any work of visual art that the author did not create.

Right of Integrity: This right allows an author to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation or other modification of the work, which would be prejudicial to the author's honor or reputation.

The Massachusetts Art Preservation law, though partially preempted by the Visual Artists Rights Amendment to the Copyright Act, provides protection for rights of attribution and integrity in "fine art" during the author's lifetime and for fifty years after the death of the author.

International Copyright Conventions

The U.S. is a party to the Universal Copyright Convention (UCC), the Berne Convention, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and the Agreement Establishing the World Trade Organization (WTO).

- *Universal Copyright Convention:* Under the UCC, signed by the U.S. as a compromise between the Berne Convention and the then-current U.S. copyright law, works by nationals of member nations and works first published in member nations are entitled to national treatment in every other member nation, if the work is unpublished or carries the prescribed notice. Member states, however, can impose additional requirements on their own nationals.
- *Berne Convention:* The Berne Convention specifies minimum levels of copyright protection and requires the principle of national treatment without requiring any formalities.
- *Agreement Establishing the World Trade Organization (WTO):* This agreement establishes a formal institutional framework for resolving trade disputes among member states. It was concluded as part of the Uruguay Round negotiations under the General Agreement on Tariffs and Trade (GATT) in 1994.

- *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs):* TRIPs establishes standards for the availability, scope, use, and enforcement (through the WTO, if necessary) of intellectual property rights, including patent, copyright and trademark. It also was concluded as part of the Uruguay Round negotiations in 1994.

Trademark Law

Trademark protection is provided by both federal and state law and is founded on the common law notion that a merchant has a right to the exclusive use of those marks which distinguish his goods or services from those of others. Unlike trademark rights in most countries, this right is based on the merchant's use of the mark; there is no registration requirement. A merchant who uses a mark in commerce, even without registering the mark, can prevent others from subsequently adopting and using confusingly similar marks for related goods or services. However, one may apply for federal registration of a mark before it has been used, based upon a bona fide intention to use the mark. In that case, rights in the mark will be retroactive to the date of application if the mark is approved by the Patent and Trademark Office, is not successfully opposed by any other person, is actually used within the statutory time period, and is then registered.

Copyright Infringement Liability and the Internet

Signed into law on October 28, 1998, the Digital Millennium Copyright Act (DMCA) established procedures by which online service providers (OSPs) can limit their liability from copyright infringing activities of their subscribers. Title II protects qualifying OSPs from liability for all monetary relief for direct, vicarious and contributory infringement.

Definition of an OSP. To be eligible for the limitations of liability under the DMCA a party must be an "OSP." The DMCA has two definitions of OSP:

- For purposes of an OSP engaged in transitory digital network communications, an OSP is defined as "an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received." This is a very broad definition, which includes almost any online service provider.

- For all other purposes an OSP is defined even more broadly as “a provider of online services or network access, or the operator of facilities therefore,” including an entity under the previously mentioned definition. This definition includes almost any web page owner.

Safe Harbors for OSPs. Under the DMCA, an OSP may qualify for a safe harbor to shield against liability for copyright infringement for third party content. To qualify for a safe harbor, the conduct of the OSP must fall into at least one of four separate categories of conduct enumerated in the DMCA. Each category of conduct has a separate set of requirements to qualify for the safe harbor protection. Included in the requirements is a “notice and take down” procedure in which an OSP must adopt and reasonably implement a policy of removing or disabling access to alleged infringing material upon proper notice of infringement. Also, the OSP must accommodate and not interfere with accepted industry standards for identifying or protecting copyrighted works.

Anti-circumvention. The anti-circumvention rules of the DMCA prohibit the circumvention of technical measures that prevent access to copyrighted work. The rules also prohibit the manufacturing, importing, offering to public, providing or trafficking in any technology, product, service, device, or component, for the purpose of circumventing measures that protect copyright owners. The DMCA makes the violation of these anti-circumvention rules a criminal offense.

Types of Marks

A mark is typically a name or word capable of identifying and distinguishing goods or services of one source from those of other sources. A mark can also comprise:

- | | |
|---|---------------------------------------|
| ■ a phrase | ■ a fragrance |
| ■ a symbol or logo | ■ a telephone number |
| ■ a graphic design | ■ a series of sounds |
| ■ a set of numbers | ■ a series of letters |
| ■ a distinctive design of a product container | ■ a distinctive combination of colors |

This list is by no means exhaustive. However, functional features of a product are not entitled to trademark protection, nor are the generic names of goods or services.

Registration of Marks

Federal Law. A trademark that is in use in interstate or foreign commerce may be registered under the federal trademark law, known as the Lanham Act. Upon application for registration, the PTO will conduct an examination to determine whether the mark is eligible for registration.

A mark will be refused registration on the federal Principal Register for the following reasons, among others:

- It is confusingly similar to a previously used or registered mark not yet abandoned
- It is merely descriptive or deceptively misdescriptive, or is primarily merely a surname
- It is a common descriptive or generic name for goods or services
- It is scandalous or disparaging
- It is an insignia of a governmental entity
- Without consent, it identifies a living individual or a deceased President during the life of his widow

Registration on the federal Principal Register provides the registrant with the following rights, among others:

- The prima facie right to exclusive ownership of the mark
- The prima facie right to exclusive use of the mark in commerce in connection with the specified goods and services during the initial ten-year term and any renewal terms
- The right to use the registration symbol ®

Merely descriptive marks and mere surnames may be eligible for registration on the federal Supplemental Register. The ® registration symbol may be used with marks registered on the Supplemental Register.

Use of the registration symbol ® acts as constructive notice to an infringer and may allow the registrant to recover profits and damages from an infringer without giving actual notice of registration. The registration term is ten years.

Massachusetts Law. A trademark owner may apply to the Office of the Secretary of State in Massachusetts for registration of any mark that is used in Massachusetts. Registration is often more easily obtained at the state level because the mark need not be in use in interstate

commerce and the examination of the application by the state trademark office is not particularly rigorous. The restrictions on registration of a mark are similar to the federal restrictions listed above. The registration term is ten years.

Both federal and Massachusetts law provide limited protection against dilution of the distinctive quality of particularly strong or famous marks.

Trade Secret Law

Massachusetts provides civil and criminal statutory protection for trade secrets. As is the case in other states, trade secrets are also protected by Massachusetts common law.

Restatement of Torts

Massachusetts has adopted the general definition of trade secret found in the First Restatement of Torts, which has also been adopted in many other states. As so defined, a trade secret may consist of any formula, pattern, device or compilation of information or other know-how that is used in a business, and gives that business an opportunity to obtain an advantage over competitors who do not know or use it.

Trade secrets commonly include formulae for chemical compounds, processes of manufacture, patterns for machines or other devices, confidential business information such as new product lines or marketing initiatives and customer lists. Indeed, in the U.S. anything may be a trade secret, as long as it is maintained in secrecy and provides a competitive advantage.

The First Restatement of Torts provides six factors to consider in determining whether particular information is a trade secret: (1) the extent of disclosure of the information inside the business (2) the extent of disclosure outside the business, (3) the measures taken to prevent disclosure of the secret, (4) the value of the information, (5) the effort or funds expended to develop the information, and (6) the difficulty or ease with which the information could be legally acquired or duplicated by others.

Protection of Trade Secrets

The distinguishing characteristic of trade secrets is their secrecy. Therefore, protection requires that those who know the secret agree or are otherwise obligated not to

disclose it. The number of authorized people aware of the secret does not affect protection of the trade secret, as long as none of them disclose the secret to anyone else. Trade secrets are generally protected through written nondisclosure agreements with employees, written license and nondisclosure agreements with authorized users and the establishment and carrying out of secrecy policies and practices.

If a trade secret is disclosed or used by an unauthorized party, the owner or licensee of the trade secret can bring either a civil or criminal action for trade secret misappropriation. Relief for trade secret misappropriation is both more variable and in some cases broader in the U.S. than in many other countries.

Unfair Competition Law

Both federal and state law prohibits the misappropriation and misuse of intellectual property under a theory of unfair competition.

Federal Law. Section 43(a) of the Lanham Act, the federal law protecting trademarks, specifically prohibits the use of false designations of origin, and false descriptions or representations of goods or services in commerce.

Both the person who creates the false designation or description, and the person having knowledge of the false designation or description, who causes or procures the goods or services to be transported or used in commerce, may be civilly liable for violation of this Section. Any person doing business in the falsely designated area or any person who believes that he or she is likely to be damaged by the use of the false description may bring a civil action against the false designator.

Massachusetts Law. Massachusetts General Laws Chapter 93A prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. For business plaintiffs, its application is limited to acts or practices that occur substantially and primarily in Massachusetts. The essential elements of an action under the Massachusetts law are the same as under the Lanham Act. The Massachusetts Attorney General, in accord with the Federal Trade Commission (FTC), has deemed a practice unfair if it:

- Is within the penumbra of some common law, statutory or other established concept of unfairness
- Is immoral, unethical, oppressive or unscrupulous
- Causes substantial injury to competitors or other businessmen
- Is oppressive or otherwise unconscionable in any respect

It has been said that for conduct to be unfair or deceptive under Massachusetts law the conduct “must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce.”

The misappropriation of a trade secret or trademark may come within the purview of this broad unfair competition law.

Transfer of Proprietary Rights

Copyrights

The transfer of copyrights in a work, or any copyright, requires a written document referencing the copyrights and signed by the owner of the copyrights conveyed. To be effective against subsequent conflicting transfers, the copyrights must be registered with the U.S. Copyright Office and the transfer must be recorded in the Copyright Office Register within one month of signing.

Patents

A signed, written document is also required to transfer a patent, any interest in a patent or a patent application. To be effective against subsequent purchasers or mortgagees, the instrument must be recorded in the Patent Assignment Division of the PTO within the specified time period.

Trademarks

A trademark may be assigned only with the goodwill associated with the mark. A pending application for federal registration based on intent to use may be assigned only if the applicant has an ongoing and existing business, and the assignee succeeds to the business of the applicant. Assignment of a federal registration of a mark or an application for registration requires a signed, written instrument. To be effective against subsequent purchasers or mortgagees, the document must be recorded in the Trademark

Assignment Division of the PTO within the specified time period.

Trade Secrets

Trade secrets are not a title-based form of property and therefore are often difficult to identify as an asset. A person seeking to obtain rights in a trade secret will want to describe the asset in the transfer documentation. The transfer documentation usually includes the agreement of the transferor not to disclose the trade secret to anyone else, and an assignment of the transferor's rights to enforce the confidentiality obligations of employees, customers and others who may have had access to the secret. There is no system for registering such rights or recording such documents.

Partial Transfers and Licenses

Written instruments are desirable, but not necessarily required, to establish an enforceable license of intellectual property rights. Licenses are not generally transferable without the consent of the licensor.

Security Interests

A consensual lien or pledge intended to secure a debt or other obligation, creates a “security interest” subject to the Massachusetts Uniform Commercial Code (UCC). The secured party should perfect its security interest by filing at the state and federal level in accordance with the UCC. At the state level, notice in the form of a “financing statement” is filed in the Office of the Secretary of State of the appropriate state. Federal filing is required to perfect against registered copyrights and may be necessary or desirable for other types of intellectual property. Care must be taken in creating a security interest to avoid jeopardizing rights in the intellectual property or creating a transfer where none is intended.

Related Internet Privacy Issues

The protection of privacy is a rapidly developing area of the law. New regulations include those relating to children, banking, healthcare, and the internet. There is no single, comprehensive law that protects an individual's privacy. Rather, protection exists under a mix of federal and state laws and case law, often relating to particular industries.

Relevant federal laws include:

- *The Graham-Leach-Bliley Act* (1999)

The act regulates the disclosure of nonpublic personal information by financial institutions. Disclosure of information is prohibited unless the customer has received notice of the institution's policies and practices regarding disclosure and been given the opportunity to "opt out."

- *The Children's On-line Privacy Protection Act* ("COPPA") (1998)

COPPA prohibits the collection of personal information from children under the age of 13 without parental consent. It requires operators of websites directed to children under the age of 13 who collect personal information from the children, to provide proper notice of the collection of the information, appropriate consent to collect the information, and access to the information by parents upon request. COPPA also requires the information collected to be limited to only that which is reasonably necessary to track online activity and all information collected be protected by reasonable procedures. The FTC has specific guidance for businesses on how to comply with COPPA. If a website operator is in compliance with an FTC-approved guideline by a self-regulatory industry organization, it may qualify for the safe harbor provision of COPPA.

- *The Electronic Communications Privacy Act* (1996)

The act protects the privacy of e-mail or other electronic communications over the Internet. Specifically, the act protects against unauthorized access, interception, or disclosure of private electronic communications by government or individuals.

Internet Privacy Policies. The misuse of personal information on the Internet is a significant concern for many consumers. Thus, a company doing business on the Internet may want to post a privacy policy on its website to increase consumer confidence. The standard elements of a privacy policy contain:

- (1) the type of information collected and how it will be used;
- (2) the identity of any third parties to whom the information will be disclosed;
- (3) how individuals can review the information and have it corrected or deleted; and
- (4) how individuals can "opt out" of having their information collected.

In addition to these guidelines, there may be other requirements based on the content or industry of the company's site. Also, it is critical to note that it is absolutely essential that any policy adopted be carefully followed. The FTC has become increasingly active in taking action against companies who disregard their own stated privacy policies.

REAL ESTATE

Purchasing real estate in Massachusetts is not particularly difficult. While Massachusetts, like each state, has its own peculiarities, the differences, except for how and where local land records are maintained, are generally not significant. There is little regulation of real estate transactions on the federal level and, except for environmental laws and the regulation of certain aspects of interstate land sales, the federal government does not interpose itself in local real estate transactions. As described under the heading "Reporting Requirements for Foreign Direct Investment" on page 52, the federal government does require that certain real estate transactions be reported, but there is no regulation of, or interference in, the transactions.

There are no restrictions in Massachusetts on the ability of foreign individuals or foreign business entities to acquire and hold real estate. In fact, a "foreign corporation" is considered to be any corporation that has not been organized in Massachusetts, whether it is organized in another state or another country. A foreign corporation, but not a foreign individual or other foreign business entity, must file a certificate with the Secretary of State setting forth certain pertinent facts concerning the corporation in which the Secretary of State is appointed its attorney for service of process. While a foreign corporation must comply with the forms of conveyance required in Massachusetts, its authority to make a conveyance is governed by the rules imposed upon it by the jurisdiction where it is created. There are no restrictions or registration requirements in Massachusetts for foreign individuals, whether they are resident or non-resident aliens, who purchase real estate.

The Real Estate Transaction

The process of buying real estate involves three principal aspects: negotiation, financing and acquisition of title, all of which are discussed briefly below. The following section highlights certain practical issues that are peculiar to the U.S. in general, and to Massachusetts in particular.

Negotiation of the Real Estate Transaction

Typically, a company establishing a facility or investing in real estate in Massachusetts will either purchase or lease real estate. In either case, the first contact a company has

will probably be with a real estate broker. While occasionally a buyer will hire his own broker, in most cases the seller engages a real estate broker as his agent to market the property to prospective purchasers. The broker's fee is computed on a percentage (usually 6% – 10%) of the purchase price. It is easy for the purchaser to be misled into thinking that the real estate broker has his best interests in mind since the purchaser is the one who contacts the broker and asks to be shown the properties that are available. However, the broker is the seller's agent, and in working for the seller has an obligation to generate the highest purchase price possible. There is nothing inappropriate about this, but it is wise to remember that absent a special agreement, the broker works for the seller and his fee increases with the price.

Once the buyer identifies a property that fits his requirements, he tenders a written "Offer to Purchase" to the seller through the real estate broker. Oral agreements to buy and sell real estate are not enforceable. Some purchasers prefer to submit a "letter of intent," which outlines the business terms. If the seller agrees to the offer, the seller will countersign the letter. Such letters of intent are usually, by their terms, not binding on either party. The Offer to Purchase is binding, although it often contains a condition that the parties will negotiate in good faith a fuller more complete contract called a "Purchase and Sale Agreement" that incorporates the business terms of the Offer to Purchase.

The respective lawyers for the buyer and the seller usually negotiate the terms of the Purchase and Sale Agreement. In addition to including the basic business terms (location of property, purchase price, etc.), the Purchase and Sale Agreement often contains a number of conditions to the buyer's obligation to purchase the property. For example, the buyer may not want to buy if there is a hazardous waste problem, if the local zoning regulations do not permit the intended use of the property or if he cannot obtain satisfactory financing. Therefore, the buyer makes his obligations subject to his being assured that these conditions will be satisfied. The seller will expect the buyer to request conditions but, since he will not want to keep his land off the market too long, the seller will insist that the buyer either waive the conditions or terminate the

agreement within a relatively short time period. A buyer often has three to four weeks to investigate and decide whether or not to proceed with the purchase.

In determining whether to buy real estate, the buyer must consider the condition of the real estate and the uses to which it may be put. These questions form the basis for the conditions in the Purchase and Sale Agreement. A careful buyer will want to evaluate the condition of the land and of any buildings and improvements that are located on the land. Most buyers will have an engineering inspector assess the physical condition of the buildings and improvements. In addition, they will have an environmental consultant test the soil and the structures for the presence of hazardous waste. Due to the complexity of environmental laws (refer to the section on "Environmental Regulation," on page 35) and the very high penalties which are payable if there are violations, it is extremely important that the buyer is satisfied with the environmental condition of the premises before the purchase is completed. Under many environmental laws, liability depends not only upon fault, but may simply be the result of owning the land, without regard to who caused the problem.

The buyer will also want a lawyer to evaluate the "zoning." Each city or town in Massachusetts has a zoning code or by-law that divides the municipality into districts and establishes the uses and dimensional requirements permitted in each district. For example, the town may require that manufacturing facilities only be located in a certain area. In addition, it may require that the facility conform to height, lot coverage, setback and other dimensional requirements. The zoning code will also regulate the minimum number of parking spaces that must be provided, the location, size and design of signs, and, often, the landscaping and other decorative amenities. Where the proposed project will not conform to the requirements of the zoning code, the buyer may, if the zoning code permits it, apply for a "variance" or "special permit," each of which allows the buyer to do something that otherwise would not be permitted under the zoning code. In extreme cases, the buyer may ask a lawyer to apply to the town to have the property "rezoned," which requires amending the zoning code.

Financing of the Real Estate Transaction

At the same time a buyer is making these investigations, the buyer may also be seeking to borrow part of the acquisition costs, unless the buyer plans to pay for all of them out of his or her own funds. The most common sources for financing are commercial banks and insurance companies. For certain kinds of property, such as low-income housing, there may be some state or federal assistance available. A prospective lender will require a substantial amount of information in advance, both about the buyer and the property. The lender will ask for financial statements, tax returns and other financial records. The lender's counsel will investigate the title to the property and the compliance of the property with local zoning laws. The lender will require a survey and will provide information about the property's compliance with environmental laws and regulations. If the buyer is a corporation, the lender will also require evidence that the buyer is properly formed, and has the authority to borrow and repay the money, together with a number of other documents and certificates.

The loan and the promise to repay the borrowed money is set forth in a "promissory note," which the buyer signs. The principal security for the repayment of the loan is a "mortgage" of the real estate. While some other states use an instrument called a "deed of trust," Massachusetts does not. By granting a mortgage to the lender, the buyer is, in effect, conveying the property to the lender as security for the repayment of the loan. Once the debt has been repaid, the lender discharges the mortgage and relinquishes its interest in the land. If the buyer defaults in the repayment of the promissory note, the lender may "foreclose" its mortgage. After certain statutory notices are sent to the owner and anyone else having an interest in the property, the property is sold at a public auction. Anyone who produces the required deposit may bid, and the money received at the auction is applied to the repayment of the debt. Where the high bid is not sufficient to repay the outstanding balance of the loan, there is a "deficiency", which the lender may collect by suing the owner.

Acquisition of Title

The actual transfer of title occurs at the "closing." Usually the buyer, the seller, their lawyers and the lawyer for the lender all meet to put into effect the loan, the transfer of title and the payment of the purchase price. These all occur simultaneously since the buyer will not pay the purchase price without obtaining title to the property, the seller will not transfer the title without the buyer's paying the purchase price and the lender will not lend the buyer the money to pay the seller unless the buyer can give the lender a security interest in the real estate. Since title is actually transferred at the closing, the seller wants to be assured of payment in good funds. Therefore, the buyer must make arrangements in advance to have the funds available in the form of a "certified check," a "bank cashier's check" or in a bank account from which the money may be sent by wire transfer directly to the seller's bank account.

At the closing, the seller delivers the "deed," which is the document that actually transfers the title, to the buyer. The buyer then signs the mortgage and the lender's lawyer takes both documents to the Registry of Deeds for recording. Prior to the closing, the lender's lawyer would make a search of records in the Registry of Deeds to confirm that the seller actually owns the land that is being sold. After the closing, the lender's lawyer completes the search and, if there have been no other transfers or liens, will record the deed and the other documents. The land records for Massachusetts are organized on a county-by-county basis, and instruments concerning real estate are recorded in the Registry of Deeds for the county in which the land is located.

Commercial real estate lenders now require their borrowers to purchase "title insurance" in connection with a loan. Prior to the closing, the lender's counsel will search the land records to determine who owns the property, whether there are liens that must be satisfied, whether there are any restrictions on the use of the property imposed by prior owners, and whether anyone else has the right to use all or part of the property (an "easement") in a way that would interfere with the buyer's intended use. Once the lender is satisfied that there are no problems, and that the buyer now owns the property, counsel will "certify the title" to the title insurance company. In turn, upon the payment of a one-time insurance premium, the title insurance company will issue a "lender's policy," which insures the priority of the

lender's security interest as a lien against the real estate and, if the buyer pays a small additional premium, will issue an "owner's policy," which insures the interest of the buyer in the real estate. Should the title be other than as stated in the title insurance policy, the title insurance company will reimburse the owner and the lender to the extent of their loss, but not, subject to certain exceptions, in excess of the face amount of the policy.

Leases of Real Estate

A business enterprise that intends to locate in Massachusetts might prefer not to tie up its funds by purchasing real estate or the property in which it is interested may not be available for sale. The solution would be to lease the property. The parties will negotiate and ultimately sign a lengthy and fairly complicated document – the lease – which gives the tenant the right to use the leased property, provides that the landlord is entitled to receive, in return, a set amount of periodic rental payments, and which defines the other conditions under which the property may be used. If the lease is not in writing, it is not enforceable. Leases usually describe who is responsible for maintaining the property, obtaining insurance and rebuilding the property if there is a casualty loss. Simpler lease arrangements, where the tenant pays rent in return for space, but the landlord manages the building, are called "space leases." A "net lease," on the other hand, is a lease where the tenant leases either all or a substantial part of a building and is responsible for all costs – repairs, replacements, insurance, real estate taxes – connected with the building. The principle is that the rent is "net" to the landlord, that is to say it is pure profit.

Most commercial leases are for five or ten-year terms, although shorter terms are available. The tenant often negotiates an option that requires the landlord, upon the tenant's request, to extend the term of the lease if the tenant agrees to pay a new rent equal to the then fair market rent for the premises. Many leases also provide that, as part of the rent, the tenant pays a proportionate share of the building's operating costs and real estate taxes. If the landlord is in a strong negotiating position, he may also require that the tenant pay an escalation in rent each year based upon increases in the Consumer Price Index (CPI) or some other economic indicator. In many retail shopping center leases, the tenant also pays "percentage rent," which is computed as a percentage of sales. Where a lease

is for a term of seven years or longer, the tenant should record a "Notice of Lease" in the Registry of Deeds to put third parties on notice of the tenant's interest in the real estate.

Massachusetts Practice

Transfer Taxes on Real Estate

Massachusetts, which taxes the right to transfer title to real estate, requires that excise tax stamps be affixed to all deeds, instruments or writings whereby any land or interest in land is sold, transferred, assigned or otherwise conveyed, and where the consideration is over one hundred dollars. The total tax rate is two dollars and twenty-eight cents per five hundred dollars of consideration or fraction thereof. The seller is responsible for the payment of the tax. The seller is permitted to deduct from the purchase price the value of any liens and encumbrances not being satisfied so that the tax is imposed only on the equity being transferred. The tax is collected at the Registry of Deeds for the county in which the land is located by requiring the seller to purchase documentary tax stamps in the appropriate amount, which are affixed to the deed before it is recorded. The tax does not apply to any instrument or writing (such as a mortgage) given to secure a debt or to any instrument or writing to which the state, a city or town, or the U.S. or any of their agencies are a party.

Barnstable County, which consists of Cape Cod, is permitted to levy a special excise tax of its own at the rate of two dollars and twenty-eight cents per thousand dollars of consideration or part thereof and the state excise tax in Barnstable County is only three dollars and forty-two cents per thousand dollars of consideration. Thus, any transfer in Barnstable County will be taxed at the total of the county and state taxes – five dollars and seventy cents per thousand dollars of consideration or part thereof.

Land Bank Fees in Dukes and Nantucket Counties

By two special acts, the Legislature has established Land Bank Commissions for Dukes County (the island of Martha's Vineyard) and Nantucket County (the island of Nantucket). The Land Banks are public organizations, which were established to collect a two percent transfer fee on real estate transferred in the country, and to use the money collected to protect the counties' natural resources

through the acquisition of open space. The two percent transfer tax, which is computed on the purchase price, is due upon the transfer of any real property interest and payment is the responsibility of the buyer, even though the buyer and seller may contract otherwise. The fee must be paid at the appropriate Registry of Deeds by certified, bank cashier's or attorney's client escrow fund check at the time of transfer and the Land Bank stamp must be affixed to the deed before it is accepted for recording. Certain types of transactions such as transfers to a government entity, gifts and contributions of real estate to form a corporation are exempt from the tax.

Nominee Trusts

Unlike most other states, Massachusetts permits an owner of real estate to hold title in a "nominee" or "realty" trust. This provides a number of advantages to a foreign investor. In an ordinary trust, legal title to the assets is in the name of the trustee and the equitable title (or benefit) is in the name of the beneficiary. The trust instrument ordinarily identifies the trustee, the beneficiary and provides that the trustee is to manage the asset for the benefit of the beneficiary.

A nominee trust, on the other hand, is a trust created to hold title to real property for the benefit of undisclosed beneficiaries. The trustee has no power to deal with the trust property except as, and when, directed by the beneficiaries. Typically, the trust instrument, which identifies the trustee but not the beneficiaries, is recorded in the Registry of Deeds for the county where the land is located. The trust provides that the beneficiaries and their respective percentages of beneficial interest in the trust are listed in a separate "schedule of beneficial interests," which is on file with the trustee. Unlike an ordinary trust, where the trustee has discretion, and perhaps a duty, to act independently, the nominee trust specifically provides that the trustee may act only at the direction of the beneficiaries. This can create a problem for third parties dealing with the trust since the authority for the trustee's actions depends upon direction from the undisclosed and unidentified beneficiaries. This is not something an outside party can readily confirm. Therefore, the nominee trust provides that a third person dealing with the trust may conclusively rely on any act undertaken by the trustee and, in addition, may rely on any certificate signed by the trustee for the truth of any matter

stated therein. Therefore, if the trustee signs a certificate that states that he was authorized to take a certain action, a third party may rely on this. A nominee trust also often provides that the beneficiaries may terminate the trust at any time and, upon termination, title to any assets owned by the trust vests in the beneficiaries.

There are a number of potential benefits where a nominee trust is used as a title-holding entity:

- *Non-disclosure of owner.* Using a nominee trust avoids having to disclose publicly the name of the actual owner of the property. There are any number of reasons why an owner may prefer this.
- *Confidentiality of business matters.* The true owner may be a business entity, for example a partnership, which is established by an agreement that the participants would prefer to keep confidential. By using a nominee trust, the true business arrangement between the parties need never be disclosed on the public record.
- *Avoidance of creditors.* An owner may find it advantageous to own property in a name that is not familiar to his creditors. Although there are other ways to accomplish this, and although a determined creditor can, through litigation, discover the true nature of the ownership, the nominee trust is an inexpensive and simple first line of defense.
- *Transfer of interests without public disclosure.* Because the beneficial interests do not appear in the public record, shares may be transferred freely without public disclosure. Where there is a sale, the buyer selects a new trustee and the beneficial interests are assigned to the new owner. (Note that even such an off-the-record transfer requires the payment of transfer taxes.) This approach can be useful when a buyer wants to avoid showing a transfer of title, for example in assembling a large parcel of land. Another situation where it is useful is when a transfer by deed would cause a mortgage to become due (a "due on sale" clause).

Some due on sale clauses are drawn in such a way that they will not be triggered by a transfer of beneficial interests.
- *Facilitates transfer.* The use of a nominee trust facilitates the acquisition, holding and transfer of interests in certain situations. First, where there are numerous owners, it might be unwieldy to collect all of the signatures every time there is a transaction. If title is held by a nominee trust, only the trustees need sign. Second, it may be difficult to deal with the property if an owner dies or becomes incapacitated. While the trustee would need the cooperation of the estate or legal guardian, the trustee is able to act without lengthy probate delays. Third, there are considerable problems in Massachusetts if a general partnership or joint venture takes title in its own name. In either case, the partnership or venture agreement should be recorded, making the business arrangement a public document, and every change in the identity of the partners and every amendment to the agreement would also have to be recorded. Using a nominee trust is much less cumbersome. Fourth, someone domiciled outside of Massachusetts might want to avoid the need for an ancillary probate administration in Massachusetts if he dies. By using a trust, he can provide that his beneficial interest passes by his will without the need for a Massachusetts probate proceeding.
- *Emergency situations.* Where it is necessary to acquire title before the intricacies of a business arrangement can be negotiated, the parties can take title in the name of a trust. The original beneficiary can later transfer the beneficial interest to a business entity to be formed later.
- *Facilitates corporate transactions.* A corporation that acquires real estate must often produce corporate votes, certificates of legal existence and other ancillary documents concerning its organization and the authority of its officers to act. A third party dealing with the trust need only rely on the authority of the trustee to act and, therefore, will not require the various documents that would ordinarily be required of a corporation. (But note that use of a trust does not necessarily mean that corporate transfer taxes will not be due.)
- *Foreign corporate transactions.* It is very inconvenient for non-resident aliens to acquire title in the name of non-U.S. (and especially "off shore") corporations. Such corporations often have structures and characteristics that are different than U.S. corporations and cannot produce the types of documentation necessary for a U.S.

real estate transaction. For example, a non-U.S. corporation might not be able to produce an instrument signed by its president and treasurer because it has managing directors and does not recognize those offices. Another example would be where a non-U.S. corporation could not adequately establish its legal existence because of a difference in registration requirements. Where a nominee trust is used, it is not necessary to look behind the authority of the trustee. (Note that use of a trust will not avoid the requirements of federal tax withholding laws since most experienced lawyers will require a trust to certify that it is not a "non foreign person" for federal tax purposes.)

There are potential drawbacks to using a nominee trust, but, on the whole, anyone who uses a nominee trust will be no worse off for having used one. First, for certain

reasons based on common law trust principles, Massachusetts courts may ultimately find that a nominee trust is, in fact, not a trust at all but is an agency relationship where the trustee is merely an agent for the true owner, the beneficiary. Second, the beneficiary is probably personally liable to the creditors of the trust so that a nominee trust should not be viewed as a shield against creditors. Third, although the trust provides that the trustee can act only at the direction of the beneficiaries, the trust instrument puts third parties on notice that they may rely upon any action taken by the trustee without checking further. Thus, the beneficiary assumes the risk that his nominee will not act dishonestly.

ENVIRONMENTAL REGULATION

Environmental laws affect a wide variety of business operations and land use development projects in Massachusetts. Regulation occurs at the federal, state, and local level and the laws are administered by a variety of different types of agencies and boards. The many potentially applicable laws, combined with overlapping jurisdictions of regulatory authorities, make this field of law highly specialized and replete with traps for the unwary.

Massachusetts' environmental laws have achieved a mature balance, combining regulatory controls with self-monitoring by industry, market-based incentives to achieve reductions in emissions of pollutants, and a streamlined approach to permitting. Many of the laws that affect developments rights, limit discharge of pollutants, regulate handling of chemicals and require clean up of contaminated properties have been in effect since the 1970s and 1980s. These years of experience have produced a body of interpretation that provides helpful guidance to businesses. Massachusetts government also has learned from experience. Recently, for example, it has taken steps to further streamline and consolidate permitting requirements and to offer incentives to businesses willing to clean up or redevelop contaminated properties.

Because U.S. environmental law imposes strict liability for environmental problems, in contrast to the fault-based system that characterizes most U.S. law, it is particularly critical that companies remain abreast of the many regulations potentially applicable to their operations. The challenge for those doing business in the U.S. and Massachusetts – and many companies in environmentally sensitive businesses have met that challenge and thrived – is to conduct their businesses in a profitable manner while taking steps to minimize potential environmental liabilities. Meeting this challenge can be difficult, because, while Massachusetts has made significant strides towards more market-based regulations, it is nonetheless true that environmental regulations, both on the books and as interpreted by dedicated agency employees, remain among the most stringent in the country in many areas.

The following discussion provides an introduction to U.S. and Massachusetts environmental laws. Some of those laws apply to ongoing businesses; others, only to land use development projects. Some apply regardless of whether a business uses or disposes of large quantities of hazardous substances. Each set of laws and regulations has a multitude of exemptions and exclusions, which may, if applicable, dramatically alter the financial impact of the law to a particular business or transaction. Important interpretive guidance and official policy materials may have similar effect. Reference to the appropriate statutes, regulations and guidance documents is imperative to determine their applicability to a specific situation. Consultation with competent and knowledgeable environmental counsel and technical consultants is strongly recommended. The federal Securities and Exchange Commission's rules and interpretive guidance regarding the disclosure of certain environmental matters by publicly-held companies will not be discussed here.

Minimizing and Managing Risks

The stiff penalties (including fines and, in some cases, prison terms) for violations of environmental laws and the enormous cost associated with compliance with certain of these regulations and with cleanup of contaminated soil and groundwater focus attention on environmental matters for both ongoing businesses and purchasers of businesses or property. Careful planning can minimize and manage these risks.

Because U.S. environmental laws have a broad liability net, a company acquiring a business or real property – and often its lender – are advised to conduct an environmental “due diligence” investigation to discover whether the business has committed violations or whether the property is contaminated and, if so, to allocate the risks by agreement between the buyer and the seller (and sometimes the financing entity). For example, contracts could provide for indemnities or escrow accounts to fund costs of assessment and corrective action. An environmental due diligence effort helps to ensure that the buyer's acquired assets or real property are not later devalued as a result of subsequently-discovered environmental problems. Obviously, the latter problem is also of significance to the buyer's lender.

An acquiring company and its legal counsel often engage an environmental consultant to assist in the due diligence effort. In many cases, the consultant will combine a property contamination investigation with an operational compliance evaluation aimed at investigating such issues as whether the facility or business has all necessary environmental permits and is in compliance with its permits and applicable laws, in some cases including environmental laws beyond the scope of this summary. In appropriate cases, the due diligence investigation may include a worker safety due diligence assessment. The market for environmental insurance has grown significantly in recent years and at least a significant part of these risks can often be minimized through use of the various insurance products currently available. Massachusetts has also created an insurance pool that can decrease the costs of such insurance for eligible buyers.

Finally, because the legal standards governing liabilities for successor and parent corporations – as well as the individual directors of these corporations – are in a state of flux, careful attention should be paid to business organization and structure issues so as to minimize the number of potentially liable entities.

The Key Regulatory Agencies

The Environmental Protection Agency (EPA) is the federal agency with primary responsibility for environmental matters. EPA oversees implementation of federal laws regulating management and disposal of hazardous waste, protection of water quality and wetlands, air pollution, cleanup of contaminated properties under the Superfund statute and other environmental issues. EPA's main headquarters is in Washington, D.C., but considerable permitting and enforcement power is delegated to EPA's various regional offices. Massachusetts is part of EPA's New England Regional Office, headquartered in Boston.

The Department of Environmental Protection (DEP) implements and enforces most of the State's environmental laws, which are similar to federal law. The state laws are intended to supplement the federal laws, and they are in some areas more stringent. In some cases, the Massachusetts laws operate in lieu of the related federal scheme; in other cases, the federal and state systems operate together. DEP is headquartered in Boston, and it also has four fairly autonomous regional offices located throughout

Massachusetts. DEP is one of several agencies within the Executive Office of Environmental Affairs (EOEA). Among other functions, EOEA directly administers the environmental impact review process required by the Massachusetts Environmental Policy Act (MEPA). MEPA, discussed below, is of critical importance to many projects and activities proposed in the Commonwealth.

In Massachusetts, municipalities also exercise significant control over environmental issues through their Conservation Commissions, Planning Boards, Zoning Boards, and Boards of Health. Cities and towns derive their authority both from local bylaws and from delegated state or federal laws.

Contaminated Property: Cleanup and Liability Issues

The federal law governing identification and cleanup of property contaminated by hazardous substances is the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), popularly known as the "Superfund" law, 42 U.S.C. §§ 9601, *et seq.* Superfund's impact on the business community has been enormous, largely due to the law's broad imposition of liability without regard to fault. Under Superfund, each business that generated or disposed of hazardous substances on the property may be called to bear the cost of investigation and cleanup regardless of whether the disposal activities complied with legal requirements in effect at the time.

Generally speaking, each of the responsible parties is jointly and severally liable for the "response costs" of investigating and remediating contaminated sites, at least to the government. As a result, a financially healthy or "deep pocket" defendant is potentially exposed to the entire cost of site assessment and remediation. Superfund's liability is retroactive, covering activities that occurred even before the law was adopted.

The risks under Superfund are offset somewhat by incentives designed to limit or eliminate liability in certain situations. For example, the federal government offers "Brownfields" grants to help finance cleanup and redevelopment of some types of contaminated properties. In addition, through "prospective purchaser agreements" EPA assures lenders, owners and buyers that the federal government will not pursue actions against properties cleaned up under

state programs. In 2002, Congress passed amendments to Superfund to further encourage the development of Brownfield's properties.

Massachusetts, like many states, has a liability and clean-up scheme similar to the federal Superfund, referred to as Chapter 21E and the Massachusetts Contingency Plan (MCP). Most contaminated property in Massachusetts is cleaned up under Chapter 21E and the MCP, rather than under CERCLA. Chapter 21E establishes a broad obligation to report the presence of site contamination – whether it occurred in the past or in the present, and whether suddenly or gradually through industrial use. Once contamination is discovered, it must be investigated and cleaned up in phases as delineated in the MCP.

Under the MCP, at all but the most severely contaminated sites, legally responsible parties must engage Licensed Site Professionals (LSPs) to assess contamination and risk, and to design and implement a cleanup. LSPs categorize sites into “tiers” according to severity of contamination, and DEP devotes oversight to the sites posing the most serious risk to human health or the environment. Following categorization, the responsible party must conduct a phased process of assessment and, unless the site is determined to pose no significant risk, proceed through selection, implementation and completion of appropriate remedial action. DEP conducts both random and targeted audits to ensure compliance with the MCP. The Massachusetts program offers several clear advantages over the cleanup programs of some other jurisdictions. For example, the MCP contains objective standards against which a cleanup can be measured. These objective standards make it easier to determine whether a site is a serious problem as well as to determine when cleanup is done. The MCP also allows varying levels of cleanup depending on the allowable uses of the property; land that will be used for only commercial or industrial purposes need not be as “clean” as property that will be used for residential purposes. Finally, the privatized system allows parties to control their own schedule for cleanup.

Massachusetts has gone further than the federal government to encourage cleanup and redevelopment of contaminated property. In 1998, the legislature amended Chapter 21E specifically to encourage Brownfields redevelopment.

The statute provides that innocent owners, known as “eligible persons” receive certain liability endpoints once the property has been cleaned up. Such eligible persons are also protected from most third party claims. In addition, innocent tenants, known as “eligible tenants” and downgradient property owners are generally exempted from liability. Finally, secured lenders were given even clearer statutory protection under Chapter 21E’s lender liability provisions.

The statute now also provides significant financial incentives for cleanups. Cleanups by innocent parties may now be eligible to receive certain tax benefits. Other cleanups may be eligible for grants or assistance in obtaining loans. Finally, the state has created a mechanism for buying insurance against cleanup cost overruns at favorable rates.

Although these incentives are important, they do not resolve all the concerns regarding contamination or potentially contaminated property, and potential owners, occupants or developers of real estate are well advised to evaluate carefully the environmental condition of property that they are considering for purchase or use.

Regulation of Hazardous Waste and Other Toxic Substances

“Cradle-to-Grave” Regulation of the Generation, Transport, Treatment, Storage, Recycling and Disposal of Hazardous Waste

The federal Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* (RCRA) is designed to help prevent the need for costly property cleanups by controlling the nation’s hazardous waste from the point of generation through its subsequent transportation, storage, treatment and disposal – or “cradle to grave.” To meet this mandate, EPA has promulgated complex regulations to control hazardous waste. 40 C.F.R. Parts 260 *et seq.*

Massachusetts has enacted its own hazardous waste regulatory scheme, which is codified in Chapter 21C of the State’s General Laws. Most elements of the Chapter 21C program operate in lieu of the federal program in Massachusetts. Massachusetts, like many other states, has designed its program to be both broader and more stringent than the minimum federal requirements.

It is the waste generator's responsibility to determine whether or not its waste streams are regulated under RCRA and Chapter 21C. There are two major categories of regulated hazardous wastes: waste streams specifically listed by DEP ("listed wastes"), such as wastewaters from electroplating operations, and wastes that exhibit one or more of the characteristics of toxicity, ignitability, reactivity or corrosivity ("characteristic wastes"). Chapter 21C's listed wastes encompass not only materials regulated by the federal RCRA, but also some additional materials such as used oil, certain PCB-containing wastes, and hazardous wastes that are being recycled. Some other waste categories are exempt from Massachusetts regulation.

Once material has been identified as a regulated hazardous waste, the generator is subject to various waste management requirements depending on the amount of hazardous waste generated in any given month. These restrictions include the time period during which the waste may be stored without a permit, the manner in which it must be drummed and labeled, the paperwork documenting its transportation, storage and disposal by licensed facilities, and prohibitions against its disposal in landfills.

Massachusetts regulations also contain a number of specialized provisions, which address either particular types of operations or particular waste streams. For example, the Chapter 21C regulations provide for special permits for research and development activities conducted for the purpose of developing new treatment or recycling technologies. There are now also separate regulations for the handling of cathode ray tubes present in televisions or computer terminals, and products that may contain mercury, such as fluorescent light ballasts.

Keep in mind that even a material not formally classified as a hazardous waste may require special handling and disposal. These materials include asbestos, medical waste, and materials from contaminated site cleanup that are not otherwise considered hazardous waste.

Finally, different regulations apply for transporters of hazardous waste, and for owners and operators of landfills and hazardous waste treatment, storage, and disposal facilities.

Regulation of Toxic Substances

Apart from the "cradle-to-grave" hazardous waste programs outlined above, other laws regulate the production, use, and disposal of so-called "toxic" substances, even if they are not wastes. Among the substances which the federal government regulates under the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 *et seq.*, and regulations issued at 40 C.F.R. Part 761 are polychlorinated biphenyls (PCBs). TSCA also regulates the introduction of certain new chemicals into the marketplace.

Asbestos

Asbestos was commonly used in building products and in industry until the late 1970s and must be handled carefully when buildings are renovated or demolished. Asbestos is regulated by a variety of federal and state laws including the federal Clean Air Act, which defines asbestos as a Hazardous Air Pollutant. The Occupational Safety and Health Administration (OSHA) has promulgated rules governing occupational exposure to asbestos. These rules mandate that increasingly stringent controls and work practices be applied to each of four classes of increasingly hazardous activity and require employers to inform employees of the presence and location of building materials that are presumed to contain asbestos (PACM), as well as confirmed asbestos containing materials (ACM), unless the building was built or renovated after 1979.

Massachusetts regulations require notice to federal, state and local government agencies prior to undertaking asbestos-related building demolition and renovation activities, establish safe work practices for such activities and govern the management and disposal of removed asbestos. In addition, the Massachusetts Department of Labor has issued regulations governing the licensing of firms and the certification of workers engaged in asbestos-related removal, containment or encapsulation work.

Underground and Aboveground Storage Tanks

A number of federal and Massachusetts statutes and regulations impose a variety of requirements on the owners and operators of underground and aboveground storage tanks used to contain flammable substances, hazardous substances or hazardous wastes. These myriad requirements govern notification of a tank's presence and regulate tank installation and operation, reporting of releas-

es, spills and leaks, cleanup of associated contamination, and financial responsibility requirements for tank owners and operators. These laws include the Resource Conservation and Recovery Act, discussed above, and the federal Clean Water Act.

The Massachusetts Department of Public Safety (DPS) and the DEP implement the various federal and state requirements for tanks in Massachusetts. The DPS regulations address tank construction, installation, operation and the mitigation of fire hazards associated with tanks containing flammable liquids. These regulations apply to underground and aboveground tank systems. In some respects, these regulations impose stricter requirements on tank owners than do the federal regulations. For example, Massachusetts requires that installation, storage and removal permits be obtained from the local fire department for all tanks containing flammable substances. These regulations also require notice to the local fire department in the event of a release from a tank.

Chapter 21E, discussed above, does not directly regulate tanks, but does require owners and operators to address the release or threat of release of oil or hazardous materials (flammable and non-flammable) to the environment. Notification and cleanup standards are contained in the Massachusetts Contingency Plan, discussed above. Chapter 21E also imposes broad liability upon tank owners and operators and others legally responsible for investigation and cleanup costs associated with a release from a tank system.

Massachusetts has established an Underground Storage Tank Petroleum Product Cleanup Fund, intended to facilitate cleanups of releases at "dispensing facilities." A dispensing facility is a business that stores petroleum products and dispenses them directly to motor vehicles, including boats, as fuel. Eligible claimants may be reimbursed certain allowable costs and expenses incurred as a result of responding to an eligible release or paying a final judgment for injury or property damage. In order for a release to be eligible, the owner or operator must have paid all fees in full prior to applying to the fund and must have notified DEP of the release and received a DEP tracking number. The claimant must demonstrate that the facility

was in full compliance with all applicable laws and regulations at the time of the release.

Water Pollution Control

NPDES Permits and Wastewater Pretreatment Requirements

Several federal and state laws are intended to prevent or limit the discharge of pollutants into surface waters. The most notable of these are Chapter 21 of the Massachusetts General Laws and the federal Clean Water Act, 33 U.S.C. § 1251 *et seq.* These federal and state programs operate co-extensively.

In general, specified categories of industrial dischargers are subject to technology-based effluent standards established by EPA. National Pollutant Discharge Elimination System (NPDES) permits are issued to individual industrial dischargers for "direct discharges" of their process wastewaters and other designated non-contact waters to surface waters. Massachusetts has established a variety of surface water quality standards, which are maintained and enforced in part through NPDES permits.

"Indirect discharges" of effluent to municipal or other publicly owned treatment works (POTWs) are regulated through industry-specific, as well as generally applicable, pre-treatment standards, which must be met prior to the discharge of effluent to a POTW. Typically, new "point sources" of such discharges are regulated more stringently than existing sources.

Discharges to groundwater are regulated by Massachusetts water quality programs to ensure that state-mandated groundwater quality standards are maintained.

Storm water run-off associated with industrial activities and construction sites is also regulated under the federal and state clean water acts. Under EPA's regulations, a facility may need a site-specific permit, issued in a manner similar to the basic NPDES program. However, in many cases, facilities will be eligible for coverage under a general permit issued by EPA. To be covered by a general permit, a facility must submit a Notice of Intent (NOI) in order to be covered by the permit, to develop and implement storm water pollution prevention plans and to conduct site inspections. The general permits do not authorize mixed or non-storm water

discharges; nor do they exempt permittees from spill notification requirements in the event of a release of hazardous substances into a discharge. The permit for discharges associated with industrial activities requires quarterly monitoring for certain types of facilities.

Massachusetts also regulates some storm water discharges on a case-by-case basis, focusing on discharges contaminated by contact with certain substances or potentially contaminated due to industrial locations.

Air Pollution Control

An overlapping system of federal and state laws is designed to limit the emissions of airborne pollutants from industrial facilities (Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, as amended; Chapter 111, §§ 142A through 142K of Massachusetts General Laws). DEP's air pollution control regulations appear at 310 C.M.R. Parts 6.00, 7.00 and 8.00 *et seq.* The air pollution control programs discussed in this summary concern facilities that are known as "stationary sources." The federal and state programs also extensively regulate "mobile sources" of air pollutants, such as automobiles. The federal and state regulatory scheme governing air pollutants are exceedingly complex, particularly for larger sources of air pollution.

A wide variety of air pollutants are regulated. Six air pollutants are subject to National Ambient Air Quality Standards (NAAQS) (sulfur dioxide, carbon monoxide, ozone, nitrogen dioxide, lead and particulate matter). In addition to standards for these "criteria" pollutants, EPA is continuing to develop standards for hazardous air pollutants (HAPs). Massachusetts is also paying increasing attention to carbon dioxide and other so-called "greenhouse gas" emissions (though the regulation of carbon dioxide is still in the earliest stages), and to noise pollution. It is important to recognize that a wide variety of new sources require air permits, and that those permits must be in place before construction can begin on those sources. Obviously air permits are required for major generators of air emissions, such as power plants, but they can also be required for much smaller sources, including emergency backup generators, laboratory operations, and heating boilers. Most air permits are issued by the Massachusetts DEP, but the EPA often participates in the permitting process.

A variety of different regulatory programs can apply to individual sources. For example, even relatively small sources of air pollution require a permit from the DEP issued under its air pollution control regulations at 310 CMR 7.00. A Prevention of Significant Deterioration (PSD) permit must be obtained before a major source of regulated air pollutants is constructed or modified in a significant manner. Under certain circumstances these large sources also must obtain approvals under the New Source Review program, which requires the most stringent emission control technology and often requires the purchase of emission "credits" from other sources to "offset" the new emissions to be created by the new source. The New Source Performance Standards program (NSPS) imposes technology-based limitations on designated types of new facilities or industrial operations. Large sources of hazardous air pollutants are subject to the other programs so as to achieve Maximum Achievable Control Technology (MACT) standards. Finally, large sources of air pollutants are also required to obtain an "operating permit". Basically, the operating permit program works to collect in one permit for each regulated facility, all of the various air pollution control requirements applicable to that facility.

Community "Right-to-Know": Mandated Information Disclosure

The federal Emergency Planning and Community Right-to-Know Act (EPCRA) was enacted primarily in response to the 1984 Bhopal chemical release disaster. (EPCRA is similar to the European Community's "Seveso Directive," the Directive on Major Accident Hazards of Certain Industrial Activities, 82/501 [OJ L 230, June 24, 1982], as amended by Directives 87/216 [OJ L 85, March 28, 1987] and 88/610 [OJ L 336, December 7, 1988].) Businesses covered by EPCRA are generally required to notify state and local emergency planning entities of the identities and quantities of regulated "hazardous chemicals" and "toxic chemicals," which are used or kept at their facilities or released to the environment. Notification is by the annual filing of Material Safety Data Sheet (MSDS) forms or chemical lists, inventory reports and toxic chemical release reports. EPCRA also requires regulated businesses to notify federal, state and local authorities immediately of accidental releases of hazardous chemicals.

Chapter 111F is the Massachusetts EPCRA equivalent. It requires facilities to make hazardous chemical information available to DEP and to the public. Unlike EPCRA, the chemical substances regulated under Chapter 111F have been collected in a single list, the Massachusetts Substances List, found at 105 C.M.R. § 670.000, Appendix A. This list is revised annually.

Toxics Use Reduction

The federal government and many states increasingly are providing industry with incentives and mandates to reduce the use of toxic chemicals in industrial processes. The Pollution Prevention Act of 1990 (PPA), 42 U.S.C. §§ 13101 *et seq.*, makes pollution prevention or reduction at the source a national policy and directs EPA to promote source reduction activities. Owners and operators of facilities required to file Toxic Chemical Release Reports under EPCRA are required to include toxic chemical source reduction and recycling information that then is made available to the public. EPA uses the industry-provided information to identify future pollution prevention opportunities.

The Massachusetts Toxics Use Reduction Act (TURA) represents the State's approach (Chapter 21I) to reducing toxics use. Unlike traditional "command and control" legislation, TURA allows and encourages the regulated community to determine how to achieve this goal. In addition, TURA's requirements have been coordinated to some degree with the above-described federal right-to-know reporting requirements and forms, although TURA's coverage of industrial categories is broader than the federal law.

TURA has two major prongs. The first, similar to the federal PPA, is to develop detailed information about the use of toxic and hazardous chemicals by certain firms in Massachusetts. The second prong aims to force a reduction in use of toxic and hazardous chemicals in the Commonwealth, by requiring certain Massachusetts toxics users to submit plans for reducing their use of toxic and hazardous substances and generation of toxic by-products, without shifting risks among workers, consumers or parts of the environment.

Development and Construction Projects

Much of the preceding has focused on requirements that most often apply to larger industrial or commercial facilities or contaminated properties. However, there are a host of federal and state laws that apply more broadly to the development, construction and expansion of facilities, regardless of whether those facilities generate wastes, emit pollutants, or lie on contaminated land.

In addition to conventional land use and zoning laws, which are primarily administered at the local level, key state statutory and regulatory frameworks relevant to project development include the Massachusetts Environmental Policy Act, the Wetlands Protection Act, Massachusetts General Laws ch. 91 (addressing use of tidelands), and the Coastal Zone Management Act. Requirements for on-site sewage treatment under Title V may also be significant to these projects.

The Massachusetts Environmental Policy Act

The Massachusetts Environmental Policy Act (MEPA) is administered by the EOE, and provides for comprehensive review and mitigation of the environmental impacts of projects or other activities that are subject to permits from state agencies. (MEPA is similar to the National Environmental Policy Act, which requires development of Environmental Impacts Statements (EISs) for major federal projects which may significantly affect the environment, and European Communities Directive on the Assessment of the Effects of Certain Public and Private Projects in the Environment, 85/337 [OJ L 175, July 5, 1985].) Until the MEPA process is concluded, a state agency may not issue a permit to, or provide funding for, a MEPA-covered project. Not all projects are subject to MEPA review; only projects that require state action, financial assistance, or a state permit and that are over a certain size or impact threshold (e.g., number of new parking spaces or amount of impervious surface created) must go through the process.

If a project is subject to MEPA, a project proponent first must prepare and file an Environmental Notification Form (ENF) with EOE. The ENF provides information about the project's scope and its potential environmental impacts, and

is subject to public review and comment. For smaller projects with low impacts, submission of the ENF is all MEPA requires. However, for others, the regulations require preparation of a much more detailed review, called an Environmental Impact Report (EIR). Generally, project proponents are required to prepare both draft and final EIRs.

The purpose of the EIR is to provide a detailed description of the project and its impact on the environment as well as any proposed mitigation measures intended to reduce environmental impacts, and a description of alternatives to the project and the environmental impacts of each alternative.

After the draft EIR is reviewed and commented on by various agencies and the public, the Secretary of EOE will issue a written statement summarizing the comments and areas of concern. The project proponent then must submit a final EIR that incorporates and responds to the Secretary's comments and demonstrates that all feasible measures will be taken to avoid or minimize project-related environmental impacts. The final EIR is again subject to public review and must be found adequate by the Secretary. After expiration of a brief period during which interested parties may file legal challenges, other agencies may then proceed to issue permits for or otherwise act on the proposed project.

Wetlands Protection and Coastal Zone Management

The federal Clean Water Act regulates the discharge or placement of dredged or fill material into federally-protected "navigable waters." A permit from the U.S. Army Corps of Engineers (Section 404 Permit) is required for most discharges of dredge or fill material. "Waters of the United States" include most wetland areas; "waters" and "wetlands" have been broadly interpreted. This interpretation gives the Corps of Engineers, and often EPA, a significant regulatory role in development projects in or near federal wetland areas. However, in 2001, the Supreme Court narrowed federal government jurisdiction under Section 404, in a ruling that concluded that isolated wetlands are not waters of the United States.

In Massachusetts the Army Corps administers Section 404 through the Massachusetts Programmatic General Permit (PGP). The PGP categorizes dredge and fill activities by

impact, requiring additional screening or individual permits for activities entailing impact above certain thresholds. According to the Corps, most projects approved by local conservation commissions under Massachusetts Wetlands Protection Act, discussed below, also will be below the federal thresholds for Category 1-Non Reporting projects. These may proceed under authorization of the PGP without application or notification to the Corps.

The Massachusetts wetlands and coastal zone protection system is extensive. The State's "Wetlands Protection Act," Chapter 131, § 40, requires public review and authorization by the appropriate local conservation commission of activities – such as removal, filling, dredging or alteration – that will or could alter wetlands and floodplain areas. Amendments to the Wetlands Protection Act in the mid 1990s extended protection to certain land near rivers, even if dry. DEP has promulgated regulations to implement this Act at 310 C.M.R. § 10.00 *et seq.* In general, unless an activity that will or could adversely affect certain protected interests in critical areas can be adequately conditioned to meet DEP's regulatory standards, the activity will be prohibited. Certain "limited projects," generally maintenance of or improvement to existing structures or emergency response activities, are subject to somewhat more relaxed standards. The law allows a person to seek in advance a determination whether a particular area is protected by the Act. The regulations also establish requirements for work to be conducted within a 100 foot "buffer zone" surrounding certain geographic features such as coastal and freshwater wetlands, beaches, dunes, ponds and lakes.

It is also worth noting that municipalities have authority under state law to enact their own wetlands by-laws, so long as they are at least as stringent as the state regulations. Therefore, a developer should determine whether a municipality has its own by-laws and whether those by-laws may be more stringent than the state regulations. Either way, the developer will apply first to the local Conservation Commission for approval.

Massachusetts regulates activities within the so-called "Coastal Zone" separately from-and in addition to-regulation under the Wetlands Protection Act. Therefore, activities within the Coastal Zone may be subject to regulation under both the Wetlands Protection Act and the Coastal Zone

Management (CZM) Office. The Coastal Zone Management Office has two sets of responsibilities; it implements requirements under the federal Coastal Zone Management Act, 16 U.S.C. § 451 *et seq.*, and the distinct regulatory program pursuant to the Massachusetts statute, M.G.L. Chapter 21A, § 4A. Initially, the CZM office's responsibilities are to define the limits of the Coastal Zone. See 301 CMR 20.99 (Boundary Appendix). The CZM office has also promulgated a series of policies regarding development in the Coastal Zone (301 CMR 20.99). Massachusetts gives effect to CZM policies through existing permit and management programs and by promulgating CZM regulations under such enabling acts as those governing wetlands and water pollution control.

Thus, state permitting agencies must review the applicable CZM policies before issuing state permits to projects located in the Coastal Zone, and certain statutes require licensing agencies to obtain an opinion from the CZM office that a project is consistent with CZM policies prior to issuance of a license. Similarly, federal regulations require that, before projects requiring federal licenses can be constructed within the Coastal Zone, project proponents must obtain from state authorities a determination that the project is consistent with applicable state policies. The Massachusetts CZM office has responsibility for making federal consistency determinations, based on review of the project in light of applicable CZM policies. Finally, under Chapter 91, the state regulates developments in "tidelands," which may be a somewhat misleading term to the uninitiated. "Tidelands" includes former tidelands, which may have been filled at any time, even hundreds of years ago. The state government retains an ownership interest in these filled tidelands and has promulgated regulations governing development in tidelands. See 310 CMR 9.00 *et seq.* The general thrust of the regulations is to protect the public's rights in these tidelands and, generally, to maximize the extent to which they are preserved for "water-dependent uses".

Title V

Title V is applicable to all septic systems currently in use, to the design and construction of new systems, and to the expansion and upgrade of systems. No new, upgraded or expanded system may be used without a Certificate of Compliance from the local Board of Health. Existing systems with a design flow of between 10,000 gallons per day

(gpd) and 15,000 gpd are considered "large systems" and may be required to obtain a groundwater discharge permit under the state water quality regulations. New construction with a design flow exceeding 10,000 gpd cannot be approved under Title V and must obtain a groundwater discharge permit.

Under Title V, systems must be inspected for compliance at or within two years prior to the time the title to the property is transferred. Certain locational criteria, such as specified distance in relation to surface water supplies or private water supply wells, automatically trigger upgrade requirements. Obvious failures, such as backup or ponding, also trigger upgrade requirements. If a system is found to be failing, it must be upgraded within two years to "maximum feasible compliance" with Title V. In evaluating what must be done to achieve maximum feasible compliance, the local Board of Health must consider economic feasibility of upgrading, in addition to physical possibility.

A Note About Environmental Litigation

Any summary of American environmental law would not be complete without mentioning the important role of environmental litigation both in enforcing the various laws and in reimbursing injured parties for legally compensable injuries. In addition, it is important to recognize the impacts of challenges to environmental permits in the overall project development process.

Actions to establish liability for cleanup costs, as well as penalties for violations, can be brought in both federal and Massachusetts courts under many of the environmental statutes described in this summary. Many of these statutes not only provide for suits by governmental agencies, but also allow other private parties – such as landowners, other affected persons or concerned citizens – to sue to enforce legally-established environmental law requirements.

In addition, certain statutes and the common law of Massachusetts allow private parties to sue for property damages (which may include the reduced value of land) and injunctive relief in many situations involving environmental contamination of land, water and air. The common law also allows suits for personal injuries caused by exposure to toxic or otherwise harmful substances. Potential causes of action (i.e., theories of liability) include claims of

negligence, trespass and nuisance. Recently, there has been increasing litigation activity relating to indoor air pollution and mold, which are not pervasively regulated under the existing environmental law.

One advantage to doing business in Massachusetts is that this is the only state in the entire United States where so-called “punitive” or “exemplary” damages cannot be awarded absent express statutory authorization. In addition, the normal rule in Massachusetts and throughout the United States is that each party to litigation pays its own attorneys’ fees, win or lose; the victor’s litigation expenses are not ordinarily reimbursed by the loser. However, under some environmental statutes, the loser is required to pay the winner’s attorneys’ fees, especially in suits brought by citizens’ groups or where the loser is shown to have unreasonably failed to acknowledge its legal responsibilities.

Apart from litigation relating to environmental compliance or responsibility for cleanup costs, most of the permits and approvals discussed in this section can be appealed by the party who applied for the permit, and by other aggrieved parties. Many of the regulatory programs require the initial appeal of a permit or approval to be filed with an administrative agency, rather than in court, though judicial appeal is ultimately available. Appeals can often be costly and time consuming, and in many instances the project cannot proceed until the appeals have run their course. Any developer of a project that requires approvals would be well advised to consider the likelihood of an appeal and the impacts to the project in the event of an appeal.

TAXATION

Federal Taxation

United States taxation of business income earned by a foreign investor can produce significantly varied results, depending upon the form, nature and extent of the foreign investor's activities in the U.S. The following is a general overview of the potential federal tax consequences resulting from different methods of business operation in the United States.

The Residency Rules

The United States subjects all U.S. tax residents to net progressive rate taxation on their entire worldwide income, regardless of source. Nonresidents, however, are subject to U.S. tax only on income derived from U.S. sources. Moreover, nonresidents pay only a flat 30 percent withholding tax on most U.S.-source passive income. Finally, qualified residents of countries with which the U.S. has tax treaties can take advantage of treaty provisions to reduce, or even eliminate, U.S. taxation. Therefore, from a tax perspective, foreign individuals and corporations will generally find it advantageous to avoid U.S. tax residency.

Tax Residency for Corporations and Partnerships

Corporations and partnerships are treated as United States tax residents (that is, "domestic" entities) only if they are formed under the laws of the United States, any one of the states, or the District of Columbia. Thus, investors operating in the corporate or partnership form are assured of foreign status so long as the corporation or partnership is formed outside the United States.

Tax Residency for Individuals

A foreign individual who possesses a "green card" granting him or her permanent residency in the United States is automatically a U.S. resident for federal income tax purposes. An individual who does not have a green card may also be a U.S. tax resident if he or she spends sufficient time in the United States to have a *substantial presence* here. Substantial presence is calculated on a modified day-count basis.

United States Income Taxation of Nonresident Foreign Investors

In general, a foreign investor that is not a U.S. tax resident is subject to U.S. taxation only on U.S.-source

income. The taxation of U.S.-source income depends on whether the income is considered "fixed or determinable, annual or period" (FDAP) income, or that is "effectively connected income" (ECI) with a U.S. trade or business.

Passive or FDAP Income

Most U.S.-source passive income – such as dividends, interest, rent, royalties, and annuities – is FDAP income, that is, Fixed or Determinable, Annual or Periodic income. FDAP income is not subject to U.S. net progressive taxation. Rather, the *gross* amount of FDAP income is subject to a flat 30 percent withholding tax. A taxpayer that is a qualified resident of a country with which the United States has a tax treaty may be able to reduce this tax rate to 5-15 percent in the case of dividends, and in some cases eliminate tax completely for interest or royalties.

There are three important exceptions to the general rule that passive income is taxed as FDAP income. First, passive income that is effectively connected with the foreign investor's conduct of a U.S. trade or business is not taxed as FDAP income, but rather as ECI, as described below. Second, income from the sale of a United States Real Property Interest is also taxed as ECI rather than FDAP income (see the discussion under the heading "*Income Derived from the Disposition of U.S. Real Property Interests*" below). Third, gains from the sale of capital assets (such as corporate stock), are not FDAP income. Thus, capital gains are generally not subject to United States taxation unless they are either ECI or the capital asset sold is a U.S. Real Property Interest.

Effectively Connected Income (ECI)

U.S.-source income earned by nonresident individuals and entities is subject to the net progressive federal income tax if the income is effectively connected with the conduct of a United States trade or business. Importantly, a foreign investor that engages in the conduct of a U.S. trade or business must file U.S. federal and state income tax returns; a foreign investor that has only FDAP income is generally not required to file returns.

The first step in analyzing whether U.S.-source income is ECI is to determine whether the nonresident individual or entity is engaged in the conduct of United States trade or

business. Relevant factors include the level, nature, continuity and regularity of the foreigner's activities in the United States. The activities of a U.S. agent (whether dependent or independent) are attributed to a foreign principal in this context.

If the activities involved rise to the level of a trade or business, the second step is to determine whether the income in question is *effectively connected* with the conduct of that trade or business. This analysis can often be quite complicated, since there is no requirement that the income be a *direct product* of the trade or business in order for it to be deemed effectively connected income.

For example, assume a foreign corporation operates a branch that conducts a trade or business in the United States. The corporation invests a portion of its branch earnings in the stock of a large, but unrelated, U.S. corporation. It later sells the stock at a significant profit and reinvests the stock profits in its branch business in the United States. Even though the corporation's income from the stock sale is clearly not derived directly from the conduct of its U.S. branch business, this income is treated as effectively connected with the conduct of its U.S. trade or business. This result is particularly significant because capital gains are not FDAP income; if the gain from the stock sale is not ECI, it would attract no U.S. tax at all, even if repatriated to the foreign corporation.

ECI can be active or passive income. Thus, a dividend received by a foreign investor from a U.S. corporation would normally be FDAP income and therefore taxed (withheld) at the flat rate of 30 percent. If the dividend were ECI, however, it would be taxed at rates as high as 35 percent for corporate investors and 39.6 percent for individual investors. Since ECI taxation is based on net income, however, applicable deductions may be taken against the gross amount of the income (for example, the dividend received deduction may be available to the corporate investor). As with FDAP income, treaties can significantly affect the tax treatment of effectively connected income. Under the model treaty, upon which most U.S. tax treaties are based, effectively connected income can be taxed under the normal progressive rate structure only if the income is attributable to a *permanent establishment* maintained by the foreign investor in the U.S. A permanent establishment requires a greater level of activity than a trade or business,

usually involving the existence of a fixed presence in the U.S., such as a factory, store, office or other place of management.

Income Derived From the Disposition of U.S. Real Property Interests

Foreign entities and individuals that own United States real property interests are subject to the Foreign Investment in Real Property Tax Act (FIRPTA), which automatically treats income realized upon a sale of a United States real property interest as effectively connected income. United States real property interests include direct ownership of real property located in the U.S. and any interest in a domestic corporation that is a U.S. Real Property Holding Company (USRPHC). A domestic corporation is a USRPHC if more than 50 percent of its business assets consist of U.S. real property interests.

United States tax laws offer the foreign taxpayer an irrevocable election to treat all income derived from a U.S. real property interest – not merely sale income automatically treated as ECI – as effectively connected to the conduct of a United States trade or business, whether or not the taxpayer is in fact engaged in such a trade or business. Since FIRPTA will automatically treat the income from the sale of the property as effectively connected income, taxpayers subject to FIRPTA may find it advantageous to make this election, thereby allowing them to offset income derived from the property with the costs of producing such income. If the election is not made, rental or other income derived from the property will generally be FDAP income against which no deductions are allowed, yet any gain realized upon disposition of the property will be ECI under FIRPTA and thus fully taxable.

Sourcing Rules

With certain minor exceptions, the United States will only impose taxes on a foreign individual's or entity's U.S.-sourced income. Therefore, the sourcing of a foreign investor's income is crucial to any analysis of its potential U.S. tax liability.

Sales of Personal Property

Generally, the source of gains from the sale of personal property is the tax residence of the seller. Thus, if the seller is not a United States tax resident, any gains from the sale of personal property, including corporate stock, will be

sourced outside the U.S., even though the sale may take place within the U.S. Sales of inventory, depreciable personal property and intangibles, however, do not fall under this general rule and instead have their own particular sourcing provisions.

Sales of Real Property

Gain on the disposition of real property is sourced at the property's location. Thus, if the property were located in the United States, any gain from its sale would be U.S.-sourced and automatically ECI under the FIRPTA provisions.

Other Sourcing Provisions

Interest and dividends are generally sourced at the residence of the distributing bank, corporation or other payor. Rental and royalty income is sourced at the location of the property that is the subject of the lease or license.

Methods of Business Operation and Repatriation of Earnings

The method by which earnings and profits of a U.S. business can be repatriated is a major concern of the foreign entity or individual doing business in the United States. The tax implications of operating a business through a branch, as opposed to a corporate subsidiary, can be significant.

The Branch Operation

In order to minimize the tax differences between doing business in the United States through a corporate subsidiary as opposed to operating through a U.S. branch office, the United States has instituted a "branch profits" tax. This branch profits tax operates as a second-level tax, similar to the tax imposed on dividends paid by a subsidiary corporation. Therefore, in addition to the normal first-level net progressive tax levied on the branch's profits as effectively connected income, a flat 30 percent tax is also imposed on those same profits (reduced by the first level tax already paid), but only to the extent that the profits are not reinvested in the U.S. branch's business.

While the effect of this tax is similar to the tax imposed on dividends paid by a subsidiary corporation, a major difference does exist. That is, both the first-level tax on effectively connected income and the second-level branch profits tax are imposed at the corporate level. If a subsidiary corporation is used instead of a branch, however, the first-level tax is imposed at the corporate (subsidiary) level, while the

second-level dividend tax is imposed at the shareholder level. Arguably, this double tax at the corporate level discriminates against foreign corporations doing business in the United States, since domestic corporations are subject to only one tax at the corporate level. Therefore, if the foreign corporation is a qualified resident of a country with which the United States has an income tax treaty, and such treaty contains a valid nondiscrimination clause, the foreign corporation will be fully exempt from the branch profits tax when it repatriates its earnings from its branch to its home office in a foreign country. The United States has income tax treaties containing effective nondiscrimination clauses with the following countries: Aruba, Austria, Belgium, Cyprus, Denmark, Egypt, Finland, Germany, Greece, Hungary, Iceland, Ireland, Jamaica, Japan, Korea, Luxembourg, Malta, Morocco, Netherlands, Netherlands Antilles, Norway, Pakistan, People's Republic of China, Philippines, Sweden, Switzerland and the United Kingdom. Unfortunately, certification requirements prevent a privately-held company from easily demonstrating that it is a qualified resident under most of these treaties. Accordingly, unless an overriding foreign tax goal exists or the foreign corporation's business mandates the use of a U.S. branch, consideration should be given to incorporating a U.S. subsidiary.

The Corporate Subsidiary Operation

Foreign corporations may find it beneficial to do business in the U.S. through a United States domestic corporation. The corporate subsidiary form of doing business offers the foreign investor many tax advantages over the branch form, including greater flexibility with respect to the repatriation of earnings and profits.

The first advantage offered by the corporate subsidiary form is avoidance of the branch tax discussed above. Whereas the branch tax is automatically imposed on the branch's earnings and profits that are not reinvested in the United States business for any given year, the foreign parent of a United States corporate subsidiary will not be exposed to a second level of United States tax until the subsidiary actually distributes its earnings and profits to its foreign parent.

A second advantage to the U.S. subsidiary corporation concerns the lower withholding rates available through tax treaties on dividends received by foreign corporations from their U.S. subsidiaries. As mentioned earlier, qualified resi-

dents of countries with which the United States has income tax treaties can have their FDAP withholding rates reduced from 30 percent to as low as 5 percent if the parent corporation owns at least 10 percent of the U.S. subsidiary, and to 15 percent in all other cases. No such withholding reduction is available against the branch profits tax.

Doing business in the United States through a corporate subsidiary also allows the foreign corporate investor to finance its investment through debt rather than equity. Debt financing can present many advantages over equity financing. For example, many U.S. tax treaties reduce FDAP withholding rates on interest beyond the reductions available for dividends (zero percent on interest in some cases, compared to the 5 percent or 15 percent rate on dividends discussed above).

The greatest advantage afforded through debt financing, however, is that interest payments made by the U.S. subsidiary are deductible, while dividend payments are not. The United States, however, has sharply curtailed the availability of these interest deductions through the enactment of earnings-stripping rules. Under these rules, U.S. corporations paying interest to foreign related parties may be denied, in whole or in part, a deduction for such payments. Four conditions must be met before these earnings-stripping limitations are triggered.

First, the U.S. corporation paying the interest must be related to the foreign recipient of the interest payments. Under United States tax law, the foreign recipient and U.S. subsidiary are related if the foreign parent corporation owns more than 50 percent of either the vote or value of the subsidiary corporation's outstanding stock. Second, the earnings-stripping rules apply only to the extent that the foreign recipient is exempt from U.S. withholding tax on the interest income under an income tax treaty. For example, if the applicable treaty reduces the U.S. withholding tax on interest to 10 percent from the FDAP withholding rate of 30 percent, two-thirds of the interest paid will be deemed exempt from U.S. withholding tax and thus subject to the earnings-stripping limitations. Third, the subsidiary must be thinly capitalized, which means that its debt-to-equity ratio must exceed 1.5 to one. Finally, the subsidiary must have "excess interest expense," that is, the subsidiary's net interest expense (interest expense offset by interest income) must be greater than 50 percent of its adjusted taxable income.

The earnings-stripping rules deny the subsidiary corporation an interest deduction to the extent of its excess interest expense. A disallowed deduction may be carried forward indefinitely and deducted in a future year to the extent the subsidiary does not exceed the earnings-stripping limitations in the future year.

The earnings-stripping limitations present some potential traps for the unwary foreign investor attempting to maximize the advantages of debt financing over equity financing. First, the debt-to-equity ratio rule limits the usefulness of debt financing in producing interest deductions for repatriation payments. Second, the earnings-stripping limitations can apply not only to debt owed by the subsidiary to a foreign parent, but also to debt that the subsidiary owes to an unrelated bank lender, if the bank debt is guaranteed by the foreign parent corporation. Even a simple "assurance" of repayment by the foreign parent may trigger this rule.

Transfer Pricing Rules

A foreign corporation with a United States subsidiary will inevitably conduct a variety of transactions with that subsidiary, such as loans of money, personal and real property transactions and the performance of services. These transactions present the possibility of significant U.S. tax avoidance through pricing schemes. For example, a foreign parent incorporated in a country with lower tax rates than those of the United States may try to sell inventory to its subsidiary distributorship in the U.S. at an artificially inflated price in order to minimize the subsidiary's U.S. tax liability on sales of the inventory.

In order to curb this kind of U.S. tax avoidance, the United States has enacted transfer-pricing rules. These rules allow the U.S. Internal Revenue Service to reapportion income and deductions between the U.S. subsidiary and its foreign parent if it determines that they have not conducted their transactions in an arms-length fashion, that is, in a manner consistent with the commercial practice of unrelated parties. In the past, the Internal Revenue Service has experienced difficulties enforcing the transfer pricing rules because of a perceived "information gap" caused by difficulties in obtaining foreign parent business records. In response to this perceived information gap, the United States now imposes potentially burdensome information-reporting and record-keeping requirements on foreign-owned corporations, supported by substantial monetary and other penalty provisions

to ensure compliance. Foreign investors owning U.S. business operations should pay careful attention to these information-reporting and record-keeping rules.

Massachusetts Taxation

Taxes levied by The Commonwealth of Massachusetts include a personal income tax, sales tax and corporate profits tax, all of which are collected by the state government. In addition, local cities and towns assess a property tax, limited by state law to 2.5 percent of the fair market value of the property.

The Corporate Tax Regime

Corporations organized under the laws of Massachusetts are fully subject to taxation by the state. Foreign and domestic corporations organized outside of Massachusetts can also be subject to the state's corporate tax, but only to the extent they do business in Massachusetts or own property in the state. The Massachusetts corporate tax is essentially an excise, or fee, for doing business in the state. It is calculated partially on the basis of property owned by a corporation and partially according to the corporation's net income. The property component of the tax is assessed at the rate of \$2.60 per \$1,000 worth of property located in Massachusetts. The income component is assessed at the rate of 9.5 percent of net income attributable to Massachusetts, whether or not the income is distributed to shareholders. In computing net income, deductions are allowed for ordinary and necessary business expenses; special tax incentives, such as accelerated depreciation rules and an investment tax credit for purchases of depreciable property, are also available.

Corporations that do not operate solely within Massachusetts (that is, multi-state and multi-national corporations) are subject to Massachusetts taxation only to the extent of their income attributable to Massachusetts. The state uses a three-factor income apportionment formula to determine the portion of a multi-state or multi-national corporation's net income that is taxable in Massachusetts. The elements of this formula consist of a property factor, sales factor and payroll factor. Manufacturing companies use only the sales factor, instead of the standard three-factor apportionment

formula; using only the sales factor ordinarily results in lower Massachusetts tax liability for manufacturing companies.

Special Corporate Incentives

Investment Tax Credit

Massachusetts provides a one percent investment tax credit based on the cost of depreciable real and personal property, if the property is both used and located in Massachusetts. The credit offsets state corporate tax liability, and both foreign and domestic corporations doing business in Massachusetts are eligible for the credit.

Dividends Received Deduction

Massachusetts permits corporations to deduct from their net income 95 percent of the value of all dividends received from other corporations, unless the corporate shareholder owns less than 15 percent of the voting stock of the corporation that paid the dividend.

R&D Tax Credit

Massachusetts grants a tax credit for foreign and domestic corporations that engage in research and development in the state. Like the investment tax credit, the R&D credit is available to offset a corporation's excise tax liability, but the R&D credit is limited to a percentage of the qualified research expenses incurred in any given year.

Other Massachusetts Taxes

Massachusetts taxes personal income at a flat rate of 5.3 percent. The Massachusetts constitution prevents the state government from instituting a progressive rate tax, so all personal income is taxed at this flat rate.

Property taxes are collected by Massachusetts cities and towns on the fair market value of business and residential real property. By special constitutional amendment, Massachusetts has limited the property tax rate that localities can levy to 2.5 percent of assessed value. This special constitutional amendment, called "Proposition 2-1/2," also restricts the ability of cities and towns to increase their property tax rates, thereby stabilizing the property tax burden.

ANTITRUST AND TRADE REGULATION

Both the U.S. and Massachusetts have enacted extensive laws and regulations aimed at preventing and punishing “unreasonable restraints” on free trade, monopolistic practices and unfair competition. Generally, transactions that involve commerce in more than one state and international commerce are governed by federal laws. However, Massachusetts’ broad unfair competition law is often invoked in areas in which federal law does not govern or to provide remedies beyond those available under federal law.

Federal Law

The U.S. antitrust laws include the Sherman Act, the Clayton Act, and the Robinson-Patman Act. The Sherman Act prohibits contracts, combinations and conspiracies that unreasonably restrain trade. Certain restraints on trade, most notably price fixing agreements among competitors, are “per se” unreasonable. Certain other restraints, for example, controls placed by manufacturers on the sales activities of distributors, are usually governed by the “rule of reason” in which the pro-competitive and anticompetitive effects of the activity are weighed against each other. The Sherman Act also prohibits monopolization, attempted monopolization and conspiracies to monopolize. The U.S. government may bring both criminal prosecutions and civil lawsuits to enforce the Sherman Act. The Sherman Act can apply to wholly extraterritorial conduct if it is intended to and does have a substantial effect in the U.S.

The Clayton Act prohibits certain specific anticompetitive activities. For example, it prohibits a seller with market power in one product from forcing a customer to buy a second product in order to purchase the first product, so-called “tying.” It also prohibits mergers and acquisitions that would tend to lessen competition in a given area of commerce.

The Robinson-Patman Act prohibits discrimination and inducing others to discriminate in the price charged for commodities of “like grade and quality” to competing buyers, and certain discriminatory advertising allowances, brokerage payments and services rendered in connection with the purchase of goods. Given the complexity of the law in

these areas, potential violations of the Clayton Act and Robinson-Patman Act must be assessed on a case-by-case basis. The U.S. government has the power to enforce both the Clayton Act and the Robinson-Patman Act through either the Justice Department or the Federal Trade Commission.

Private individuals and corporations that are injured by violations of the U.S. antitrust laws, including the Sherman Act, Clayton Act or the Robinson-Patman Act, may sue for injunctive relief, three times their actual damages, and their attorneys’ fees (15 U.S.C. §15). Companies seeking to engage in certain cooperative research, development or production joint ventures may apply to the U.S. Department of Justice and Federal Trade Commission and may, under the proper circumstances, obtain an exemption from the liability for treble damages and attorneys’ fees.

U.S. antitrust policy is also promoted through the Federal Trade Commission Act (FTC Act) and the Hart-Scott-Rodino Antitrust Improvements Act of 1976. The FTC Act is intended to protect U.S. consumers, domestic industry and exporters from “unfair methods of competition” and “unfair or deceptive acts or practices.” The U.S. Federal Trade Commission has broad authority to determine what constitutes an unfair method of competition or an unfair trade practice. U.S. courts have upheld FTC cease and desist orders that enforce the antitrust laws and similar policies (for example, orders relating to mergers, acquisitions and joint ventures), and orders that prohibit false representations about products and other similar practices. Under appropriate circumstances, the FTC will issue advisory opinions as to whether a particular business policy would violate the FTC Act.

The Hart-Scott-Rodino Act requires that companies proposing to acquire companies that do business in the U.S. or assets located in the U.S. must, under certain circumstances, report such proposals to the FTC and the Justice Department prior to the acquisition. Whether reporting is required depends on a formula related to the size of the acquiring company and the size of the assets being

acquired. Transactions valued at less than \$50 million do not have to be reported. Failure to report may lead to fines of up to \$10,000 per day. The current non-refundable filing fee is \$45,000 to \$180,000, depending on the size of the transaction. It must be paid by the acquiring party for each proposed transaction to which Hart-Scott-Rodino applies. Like the FTC Act, Hart-Scott-Rodino may only be enforced by the U.S. government.

Massachusetts Law

Although private lawsuits may not be brought to enforce the FTC Act, the Massachusetts unfair competition statute, Massachusetts General Laws, Chapter 93A, broadly defines unfair trade practices to include all activities that are prohibited by the FTC Act and other activities adjudged to violate the principles of fair competition. Chapter 93A provides for civil actions by private parties and injunctive relief, up to three times actual damages, statutory damages, and attorneys' fees. Many other U.S. states have similar statutes. For example, one of the largest verdicts in a lawsuit in U.S. history was obtained in the *Pennzoil v. Texaco* case that was brought under the Texas unfair trade practices statute. The Supreme Judicial Court of Massachusetts recently has held that consumers that purchase products indirectly from antitrust violators have standing to recover damages under Chapter 93A, even though they are barred from recovering under federal law by the Illinois Brick rule.

Practical Applications

Even among U.S. lawyers, antitrust is regarded as a particularly complex area of the law. As a rule of thumb, upon entering the U.S. market, foreign companies with market power in a given area of commerce should have the structure of their proposed U.S. activities reviewed for antitrust compliance by an experienced attorney. Companies that have market power through ownership of patents, copyrights or unique trade secrets should be particularly aware of the relationship between the intellectual property and antitrust laws in that use of intellectual property rights to enhance a company's market power in other areas of commerce may, under certain circumstances, result in forfeiture of the intellectual property rights and civil liability.

Agreements with competitors and agreements with suppliers and vendors that affect competition should also be carefully reviewed. For example, certain communications among competitors that are legal abroad may be prohibited in the U.S.

The FTC's pre-sale disclosure rule, 16 C.F.R. §436, applies to offers or grants of franchises. Generally speaking, this rule requires that a franchisor provide potential franchisees with certain prescribed disclosure documents, that the documents be provided at the prescribed time and that the franchisor abide by rules concerning representations and claims about the actual or potential sales, income or profits of existing or proposed franchise operations. Unlike many other states, Massachusetts does not currently have a generally applicable law that requires all franchisors to register disclosure documents with state authorities. Disclosure laws may apply in particular industries.

Companies engaged in business and asset acquisitions (including exclusive patent licenses) should ascertain whether they need to do a Hart-Scott-Rodino filing. Joint venturers engaged in cooperative research, development and production might wish to register with the Justice Department.

With respect to unfair competition laws, particularly until a company becomes familiar with local business practices, it may wish to seek legal advice about the legality of marketing and selling techniques that have a direct impact on competitors or consumers. For example, U.S. law may require disclosure of certain facts by the seller to the buyer about property being sold prior to completion of the sale. Failure to provide full disclosure of the appropriate information may subject the seller to treble damages for an unfair trade practice.

REGULATION OF INTERNATIONAL TRADE AND INVESTMENT

Foreign investment in the U.S. and other international commercial activities involving U.S. entities are subject to a number of U.S. statutes and related regulations. The following discussion outlines some of the more important aspects of these laws, which might be relevant to someone investing in or trading with entities located in the U.S.

Restrictions on Foreign Investment

Under a statutory provision commonly referred to as the Exon-Florio Amendment (50 U.S.C. app. § 2170), the President has broad authority to investigate and prohibit any merger, acquisition or takeover by or with foreign persons which could result in foreign control of persons engaged in interstate commerce if the President determines that such merger, acquisition or takeover constitutes a threat to the national security of the U.S. Congress has indicated that the term “national security” is to be interpreted broadly and that the application of the Exon-Florio Amendment should not be limited to any particular industry.

The statute sets out a timetable for investigations of transactions, which can take up to 90 days to complete. The President or his designee has 30 days from the date of receipt of written notification of a proposed (or completed) transaction to decide whether to undertake a full-scale investigation of the transaction. The President has delegated his authority to make investigations pursuant to the Exon-Florio Amendment to the Committee on Foreign Investment in the U.S. (CFIUS), an interagency committee made up of representatives of various executive branch agencies. Notifications of transactions are not mandatory and may be made by one or more parties to a transaction or by any CFIUS member agency.

If at the end of the initial 30-day period after notification of a transaction, CFIUS decides that a full-scale investigation is warranted, it then has an additional 45 days to complete this investigation and make a recommendation to the President with respect to the transaction. The President then has 15 days in which to decide whether there is credible evidence that leads the President to believe that the foreign interest exercising control might take action to impair the national security. If the President makes such a determination, Exon-Florio empowers the President to take any action that the President deems appropriate to suspend or prohibit the

transaction, including requiring divestment by the foreign entity if the transaction has already been consummated.

U.S. law also places certain restrictions on acquisitions of businesses that require a facility security clearance in order to perform contracts involving classified information. Under Department of Defense regulations, foreign ownership may cause the Department to revoke a security clearance unless certain steps are taken to reduce the risk that a foreign owner will obtain access to classified information (DOD 5220.22-R). Assuming that a foreign owner will be in a position to effectively control or have a dominant influence over the business management of the U.S. firm, the Department of Defense may require, as a condition to continuation of the security clearance, that the foreign owner establish a voting trust agreement, a proxy agreement or a special security agreement approved by the Department of Defense and designed to preclude the disclosure of classified information to the foreign owner or other foreign interests (see DOD 5220.22-M, Industrial Security Manual for Safeguarding Classified Information).

Reporting Requirements for Foreign Direct Investment

All foreign investments in a U.S. business enterprise which result in a foreign person owning a 10% or more voting interest (or the equivalent) in that enterprise are required to be reported to the Bureau of Economic Analysis, a part of the U.S. Department of Commerce. Pursuant to the International Investment and Trade in Services Survey Act (22 U.S.C. §§3101-3108) and the regulations promulgated thereunder (15 C.F.R. §806), such reports must be made within 45 days after the investment transaction. Depending on the size of the entity involved, quarterly, annual and quintennial reports may be required thereafter.

The International Investment and Trade in Services Survey Act

The International Investment and Trade in Services Survey Act (IISA or the “Act”), passed in 1976, authorizes the President to collect information and conduct surveys concerning the nature and amount of international investment in the U.S. The IISA’s primary function is to provide the federal government with the information necessary to formulate an

informed national policy on foreign investments in the U.S. It is not intended to regulate or dissuade foreign investment but is merely a tool used to obtain the data necessary to analyze the impact of such investments on U.S. interests.

Under the IISA, international investments are divided into two classifications – direct investments and portfolio investments. Congress has delegated its authority to collect information on both types of international investments to the President. In turn, the President has delegated his power to collect data on direct investments to the Bureau of Economic Analysis (BEA), a part of the Department of Commerce, and on portfolio investments to the Department of the Treasury.

A “foreign person” is any person who resides outside of the U.S. or is subject to the jurisdiction of a country other than the U.S. A “direct investment” is defined as the ownership or control, directly or indirectly, by one person of 10% or more of the voting securities in any incorporated U.S. business enterprise or an equivalent interest in an unincorporated business enterprise. Because the IISA further defines “business enterprise” to include any ownership in real estate, any foreign investor’s direct or indirect ownership of U.S. real estate constitutes a “direct investment” and falls within the requirement that reports be filed with the BEA.

Unless an exemption applies, a report on Form BE-13 must be filed with the BEA within 45 days of the date on which a direct investment is made. The form collects certain financial and operating data about the investment, the identity of the acquiring entity and certain information about the ultimate beneficial owner. In addition, a Form BE-14 must be filed by any U.S. person assisting in a transaction, which is reportable under Form BE-13 unless a Form BE-13 causing such transaction is already being filed. The purpose is, obviously, to ensure that those required to file a Form BE-13 do so.

The Agricultural Foreign Investment Disclosure Act of 1978

The Agricultural Foreign Investment Disclosure Act of 1978 (AFIDA or the “Act”) requires all foreign individuals, corporations and other entities to report holdings, acquisitions and dispositions of U.S. agricultural land. The Act contains no restrictions on foreign investment in U.S. agricultural land and is aimed only at gathering reliable data from reports filed with the Secretary of Agriculture to determine the nature and

magnitude of this foreign investment. Unlike the reports filed under the International Investment Survey Act of 1976, reports filed under AFIDA are not confidential but are available for public inspection.

For the purposes of the Act, a “foreign person” is: (1) any individual who is not a citizen or national of the U.S. and who is not lawfully admitted to the U.S.; (2) a corporation or other legal entity organized under the laws of a foreign country or which has its principal place of business outside the U.S.; (3) a corporation or other legal entity organized in the U.S. in which a foreign person, either directly or indirectly, holds ten percent or more of an interest; and (4) a foreign government. The definition of “agricultural land” is any land in the U.S. that is used for agricultural, forestry or timber production. AFIDA requires a foreign person to submit a report on Form ASCS-153 to the Secretary of Agriculture any time he holds, acquires or transfers any interest, other than a security interest, in agricultural land. The report requires rather detailed information concerning such matters as the identity and country of organization of the owning entity, the nature of the interest held, the details of a purchase or transfer and the agricultural purposes for which the foreign person intends to use the land. In addition, the Secretary of Agriculture may require the identification of each foreign person holding a ten percent or more interest in the ownership entity.

Export Controls

In general, U.S. export controls are more stringent and restrict a wider array of items than the export controls of most other countries, even with respect to non-military “dual-use” commodities and technology. (See the Export Administration Act of 1979, as amended, 50 U.S.C. App. §§2401-2420 and the regulations promulgated thereunder, 15 C.F.R. §§730-799). Except for exports to U.S. territories and possessions, and in most cases, Canada, exports from the U.S. may be subject to an export “license.” An export license is a government authorization that allows the export of particular goods or technical information. Licenses are required for those items for which the U.S. specifically controls the export for reasons of national security, foreign policy or short supply.

A wide array of “license exceptions” is available for exports to a wide array of countries, persons and entities. If a license exception is not available for the export of a specific product

or specific data to a specific destination, person or entity, it is necessary to apply for and obtain a license from the U.S. Department of Commerce, prior to the export. Certain commodities cannot be exported to any country without an individual license, while other commodities and technology may require a license only for shipment to specified countries.

For purposes of the U.S. export control regulations, an export of technical information occurs when the information is disclosed to a foreign national even if such disclosure occurs in the U.S. Thus, if disclosure of information is subject to a license requirement, the disclosure may not be made to a foreign national without first obtaining the necessary license, whether or not the disclosure is to occur outside the U.S. This aspect of the export control regime often leads to unexpected restrictions on hiring and the sharing of information.

U.S. export control regulations have been revised to permit many commodities formerly requiring a license to be exported pursuant license exceptions. Despite the revisions, however, licenses will continue to be required for many commodities, and the procedures for obtaining such licenses will continue to be time consuming.

Foreign Trade Zones

Foreign trade zones are areas in, or adjacent to, ports of entry, which are treated as outside the customs territory of the U.S. In order to expedite and encourage trade, goods admitted into a foreign trade zone are generally not subject to the customs laws of the U.S. until the goods are ready to be imported into the U.S. or exported. These foreign trade zones are isolated, enclosed and policed areas which contain facilities for the handling, storing, manufacturing, exhibiting and reshipment of merchandise. Foreign trade zones are created pursuant to the Foreign Trade Zones Act (19 U.S.C. §§ 81a-u) and are operated as public utilities under the supervision of the Foreign Trade Zones Board. Under the Foreign Trade Zones Act, the Board is authorized to grant to public or private corporations the privilege of establishing a zone. Regulations covering the establishment and operation

of foreign trade zones are issued by the Foreign Trade Zones Board, while U.S. Customs Service regulations cover the customs requirements applicable to the entry of goods into, and the removal of goods from, these zones.

Antidumping and Countervailing Duties

The U.S. antidumping law (19 U.S.C. §§1673-1677) provides that if a foreign manufacturer sells goods in the U.S. at less than fair value and such sales cause or threaten material injury to a U.S. industry, or materially retard the establishment of a U.S. industry, an additional duty in an amount equal to the "dumping margin" is to be imposed upon the imports of that product from the foreign country where such goods originated. Under the statute, sales are deemed to be made at less than fair value if they are sold at a price that is less than their "foreign market value" (which generally is equivalent to the amount charged for the goods in the home market). The dumping margin is equal to the amount by which the foreign market value exceeds the U.S. price.

The U.S. countervailing duty law (19 U.S.C. §§1671-1677) also imposes a duty on imported merchandise manufactured or exported to the U.S. with subsidies provided by foreign governments. Such subsidies take various forms, such as direct cash payments, credit against taxes or loans with artificially low interest rates or other terms more favorable than market conditions. By imposing countervailing duties, the U.S. law protects domestic industries against unfair competitive advantage foreign manufacturers and exporters receive from subsidized programs. Unlike antidumping duties, depending on the country from which the subsidy merchandise originates, countervailing duties may sometimes be imposed without application of a material injury test.

The Secretary of Commerce is charged with determining whether merchandise is being sold at less than fair value in the U.S. or its manufacture, production or export to the U.S. has been subsidized. The International Trade Commission makes the determination of whether such sales cause or threaten material injury to a U.S. industry.

RESOURCE LISTING FOR MASSACHUSETTS

Cambridge Chamber of Commerce

859 Massachusetts Avenue

Cambridge, MA 02139

Telephone 617.876.4100

Fax 617.354.9874

Email ccinfo@cambridgechamber.org

Website www.cambridgechamber.org

Greater Boston Chamber of Commerce

75 State Street, 2nd Floor

Boston, MA 02109

Telephone 617.227.4500

Fax 617.227.7505

Email webmaster@bostonchamber.com

Website www.bostonchamber.com

Massachusetts Biotechnology Council

One Cambridge Center, 9th Floor

Cambridge, MA 02142

Telephone 617.577.8198

Fax 617.577.7860

Email info_request@massbio.org

Website www.massbio.org

Massachusetts Department of Corporations

One Ashburton Place, 17th Floor

Boston, MA 02108

Telephone 617.727.9640

Massachusetts Department of Revenue

51 Sleeper Street

Boston, MA 02205

Telephone 617.727.4201

Fax 617.727.0379

Massachusetts Division of Employment and Training

19 Staniford Street

Boston, MA 02114

Telephone 617.626.6600

Fax 617.570.8581

Massachusetts Industrial Finance Agency

75 Federal Street, 2nd Floor

Boston, MA 02110

Telephone 617.451.2477

Fax 617. 451.3429

Massachusetts Office of Business Development

10 Park Plaza, Suite 3720

Boston, MA 02116

Telephone 617.973.8600

Fax 617.973.8797

Massachusetts Office of Travel & Tourism

10 Park Plaza, Suite 4510

Boston, MA 02116

Telephone 617.973.8500

Telephone 800.227.MASS (U.S. & Canada)

Fax 617.973.8525

Email vacationinfo@state.ma.us

Massachusetts Software and Internet Council, Inc.

One Exeter Plaza, Suite 200

Boston, MA 02176 - 2831

Telephone 617.437.0600

Fax 617.437.9686

Email info@msicouncil.org

Website www.swcouncil.org

Massachusetts Trade Office

State Transportation Building

10 Park Plaza, Suite 3720

Boston, MA 02116

Telephone 617.973.8650

Fax 617.227.3488

Email masstrade.office@state.ma.us

Massachusetts Trade Office Germany

Am Karlsbad II

D-10785 Berlin

Germany

Telephone 49.30.39.90.2547

Fax 49.30.39.90.2548

NOTES



**FOLEY
HOAG** LLP
ATTORNEYS AT LAW

Boston • Washington • www.foleyhoag.com